No. 89-1391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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CERTIORARI GRANTED MAY 25, 1990

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QUESTIONS PRESENTED

1. Whether regulations prohibiting abortion counseling, referral, and advocacy, while requiring physicians to provide information and referrals for prenatal care to protect the "unborn child," violate the First Amendment (a) by imposing viewpoint-discriminatory conditions on the speech of private health care professionals employed in Title X funded family planning programs; and (b) by penalizing the right of Title X grant recipients to speak freely about abortion with non-Title X funds.

2. Whether regulations requiring physicians to provide incomplete and misleading information to women diagnosed as pregnant at Title X clinics violate the Fifth Amendment.

3. Whether Title X's prohibition on the use of federal funds "in programs where abortion is a method of family planning" should be construed not to authorize regulations that raise serious constitutional questions; that are not required or expressly contemplated by the statute's text; that are at odds with the statute's structure and history; and that were promulgated after nearly two decades of administrative interpretation of the statute to permit neutral abortion counseling and referral.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Second Circuit are those in the caption (appellants in C.A. No. 88-6206 and petitioners herein) as well as the State of New York, the City of New York, and the New York City Health & Hospitals Corporation (appellants in C.A. No. 88-6204 and petitioners in No. 89-1392).

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OPINIONS BELOW

The decision of the district court is reported at 690 F. Supp. 1261 (S.D.N.Y. 1988). 9-32a.[1] The decision of the court of appeals is reported at 889 F.2d 401 (2d Cir. 1989). 35-67a. The Second Circuit granted an injunction pending review on certiorari by this Court on November 21, 1989. 68-69a.

JURISDICTION

The final judgment of the court of appeals was entered on November 1, 1989. The petition for writ of certiorari was filed on March 1, 1990 and granted on May 29, 1990. 110 S. Ct. 2559 (1990). This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. amends. I, V, XIV.

Family Planning Services and Population Research Act of 1970, 42 U.S.C. §§ 300-300a-6a (1982). J.A. 3-12.

Regulations Governing Grants for Family Planning Services, 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10 (1988). 1-8a.

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1 The opinion is reprinted in the Appendix to Petitions for Writ of Certiorari in *Rust v. Sullivan* and *New York v. Sullivan*. Citations to the Appendix to the Petitions for Certiorari are made as "__a." Citations to the Joint Appendix accompanying Petitioners' briefs in this Court are made as "J.A. _____." Citations to other materials in the record below will be to "__A" (referring to the joint appendix filed in the Second Circuit) or by name and date of document. References to affidavits and declarations in the record, but not included in an appendix in this Court, will be to "Name ¶ _____ (date)" with a cross citation to "_____A" where available. The challenged regulations, cited as "§ __," are reprinted herein as Exhibit A for the convenience of the Court.

STATEMENT OF THE CASE

A. Introduction

At issue in this case are regulations promulgated in 1988 by the Secretary of the United States Department of Health and Human Services ("HHS") and codified at 42 C.F.R. §§ 59.2, 59.8, 59.9, 59.10 (1988). The regulations were purportedly promulgated under the authority of the Family Planning Services and Population Act of 1970, 42 U.S.C. §§ 300-300a-6a (1982) ("Title X") at J.A. 3-12, which authorizes federal subsidies for family planning clinics serving predominantly low-income clients. Since Title X was enacted in 1970, Congress has barred the use of funds for the provision of abortions as "a method of family planning," 42 U.S.C. § 300a-6 ("section 1008") at J.A. 10, but until 1988 HHS had consistently interpreted this directive as having no bearing on speech and information between a doctor or counselor and her patient and had expressly permitted nondirective abortion counseling and referral by Title X programs. In sharp contrast, however, and without any intervening directive from Congress, the new regulations decree an end to the era of full medical information for pregnant women at Title X clinics.

B. The Nature and Purpose of Title X

Title X is the single largest source of federal support for family planning and reproductive health care.[2] Enacted to subsidize "the establishment and operation of voluntary family planning projects," 42 U.S.C. § 300(a) at J.A. 3, Congress has appropriated between one and two million dollars per year for approximately 3900 clinics nationwide serving nearly five million low-income clients annually.[3] Title X, like Medicaid and Medicare, does not establish federal health care agencies, but rather constitutes a collaborative effort with the private sector, including nonprofit and public health care

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2 Seventy-seven percent of all family planning clinics received Title X funds. Torres, *The Effects of Federal Funding Cuts on Family Planning Services, 1980-1983*, 16 Fam. Plan. Persp. 134, 135 (1984) (Table 1).

3 *See generally* Dryfoos, *Family Planning Clinics—A Story of Growth and Conflict*, 20 Fam. Plan. Persp. 282 (1988).

agencies at a state and local level, to provide reproductive health information and services.[4] Although many of these agencies are supported largely by federal grants or reimbursements from a variety of sources, they also receive substantial funds from state and private sources including charitable contributions and fees from clients who can afford to pay. *See* § 59.5(a)(7), (8).[5] The overwhelming majority of these women are poor, however, most having incomes below 150% of the poverty line. J.A. 160, 171.

As the legislative history makes clear, the overarching goal of the Title X program was to expand access to those services necessary for low-income women at risk of unintended pregnancy. Congress was concerned, above all, that family planning choices be left to individual conscience. *See* 42 U.S.C. § 300a-5 at J.A. 10.[6]

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4 In New York, for example, 32 of the 41 funded agencies are private, nonprofit organizations. *See* J.A. 160; Gesche (Ex. A) at 555A.

5 Nationally, in 1983, only 33% of Title X agencies reported that Title X grants were their mean largest single source of support; the balance of their funding came from a combination of Title XIX funds (Medicaid), Maternal and Child Health Services Block Grants ("Title V"), Social Services block grants, state and local government funds, patient fees, and other private sources. Torres, *supra* note , at 136 (Table 3). For example, the South Bronx Center of Planned Parenthood of New York City ("PPNYC"), Health Services of Hudson County, New Jersey ("Hudson Health"), and Planned Parenthood of Westchester/Rockland ("PPW/R") derive respectively 50%, 33%, and 23% of their family planning budgets from Title X funds. 11a. Similarly, 70% of the budget of the Tremont Clinic Family Planning Service, run by the service division of the Medical and Health Research Association of New York ("MHRA"), is supported by Title X funds. Fink ¶ 9 (Nov. 9, 1989).

6 Members of Congress repeatedly stressed that a central purpose of Title X was to enable "all individuals . . . within the dictates of their conscience, to exert control over their own life destinies." 116 Cong. Rec. 24092 (1970); *see also id.* at 24093 (purpose was to "enable all couples to regulate fertility according to their individual consciences"); *id.* at 37384 (1970) (family planning programs must recognize that "no one should seek to impose his personal or religious convictions upon others"); *id.* at 37388 (1970) ("We must be very careful to safeguard the religious and moral convictions of all of our citizens . . . ."). Indeed, for many women, reproductive decisions including whether or not to have an abortion are religious in nature.

(footnote continued)

C. The Services Provided by Title X Clinics

Title X clinics are frequently the only low-cost providers of basic medical services and reliable health information for a dependent client population that suffers from disproportionately high rates of teenage pregnancy, infant mortality, sexually transmitted disease, and AIDS. *E.g.*, J.A. 142-44, 244-45.[7] In recognition of these facts, Congress intended Title X clinics to offer a comprehensive array of diagnostic and referral services. *See infra* Point IIIB(3).

Title X clinics in New York as elsewhere typically provide not only contraceptive information and services, but also related medical tests and advice. They are required to provide general physical examinations including an examination of blood pressure, thyroid, heart, lungs, breasts, and reproductive organs. *See* United States Dep't of Health & Human Servs., *Program Guidelines For Project Grants For Family Planning Services* § 8.3 (1981) ("*1981 Guidelines*") at J.A. 67. These clinics also test for sexually transmitted diseases, *id.* at J.A. 68, and, in some circumstances, offer counseling, education, and referral for AIDS. Memorandum from Nabers Cabaniss, Deputy Ass't Sec. for Pop. Affairs, to Regional Health Admin'rs (Dec. 8, 1987) at J.A. 72-75. Title X clinics also treat minor gynecological problems and provide general "health maintenance services." *1981 Guidelines* §§ 9.1-.2, 9.4 at J.A. 68, 70-71. Some clinics provide adoption and prenatal care services and some also provide abortion services. It is undisputed that Title X funds are not used to subsidize abortion services. *E.g.*, 11a.

E.g., Dennis ¶ 8 (Feb. 5, 1988); *see also McRae v. Califano*, 491 F. Supp. 630, 741-42 (E.D.N.Y. 1980), *rev'd on other grounds sub nom. Harris v. McRae*, 448 U.S. 297, 320 (1980); 116 Cong. Rec. at 37375 (1970).

7 In the urban areas served by New York providers, for example, the percentage of women infected with AIDS is among the highest in the nation. *See* J.A. 199; Minkoff ¶ 6 at 647A. One in every 60 women giving birth in New York City is HIV infected, with the rate rising to one in 50 in Manhattan and the Bronx. Gesche (Ex. F) (New York State Dep't of Health, *Newborn Seroprevalence Study* (1988)) at 563A. Thirty to fifty percent of the children born to these women will be infected. *Id.*

D. The Challenged Regulations

In a sharp break with prior administrative practice, *see infra* Point IIIB(4), the Secretary proposed on September 1, 1987 and promulgated on February 2, 1988 regulations introducing novel restrictions on the speech of health professionals working in Title X projects. For the first time, the Secretary interpreted section 1008 to bar Title X recipients from providing even nondirective counseling about or referral for abortion, while requiring them to counsel about and refer for prenatal care, § 59.8(a)(1), (2); to require not only financial but also wholesale physical separation of activities conducted with Title X funds from prohibited activities, § 59.9; and to bar all advocacy or other activity that renders the abortion option more accessible to the low-income women served by the program, § 59.10.

1. The abortion counseling and referral ban

The undeniably central function of the Title X program is to fund contraceptive services for a sexually active population. By definition, this population of new and ongoing family planning patients are at risk of unintended pregnancy. Although the regulations purport to refocus the Title X program on "preconceptional counseling" and away from "pregnancy care," § 59.2; *see* Preamble to Final Regulations, 53 Fed. Reg. 2927 (1988) ("Pr., ____"), they have not changed the facts of life. Under current medical technology, no method of birth control used in the United States is 100% effective.[8] In addition, some women become pregnant as a result of rape or incest[9] and the number of unintended preg-

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8 The typical failure rates of various contraceptive methods in the first year of use are: oral contraceptives, 3%; IUD, 3%; condom, 12%; diaphragm, 18%; sponge (parous women, 28%; nulliparous women, 18%); cervical cap, 18%; withdrawal, 18%; natural family planning, 20%; spermicides, 21%; chance, 85%. Trussell, Hatcher, Kates, Stewart & Kost, *Contraceptive Failure in the United States: An Update*, 21 Stud. in Fam. Plan. 51, 52 (1990).

9 About 16,000 women who are pregnant as a result of rape or incest have abortions each year. Alan Guttmacher Institute, *Facts in Brief: Abortion in the United States* (1990). *See generally* Department of Justice, Bureau

nancies nationwide is astoundingly high.[10] Thus, on a daily basis, Title X physicians encounter patients who are pregnant and do not know it, patients who suspect they are pregnant and seek confirmation of pregnancy, and patients who know they are pregnant and seek information. Indeed, concern about a possible pregnancy is a common reason for a first visit to a Title X family planning clinic[11] and pregnancy tests are frequently administered before prescribing some contraceptive methods such as the intrauterine device ("IUD") or birth control pills.[12]

For these reasons, Title X clinics, like 99% of all family clinics nationwide, provide pregnancy tests.[13] The new regulations neither eliminate this basic service nor proscribe all counseling of pregnant women by Title X projects. To the contrary, they continue to provide for services to pregnant women—but selectively.[14]

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of Justice Statistics, *Advance Press Release* at 3, 4 (May 13, 1990) (127,360 cases of rape or attempted rape in 1988). One rural Title X program in New York reported 15 patients in one year whose pregnancy resulted from rape. J.A. 155.

10 In 1982, 54% of pregnancies were unintended, amounting to a total number of 2.9 million (excluding miscarriages). Forrest, *Unintended Pregnancy Among American Women*, 19 Fam. Plan. Persp. 76 (1987).

11 *See* J.A. 150; Bennett ¶ 11 at 498A; *see also* National Research Council, National Academy of Sciences, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* 174 (1986). Nationally, two-thirds of all first visits to a family planning clinic include a pregnancy test. *Id.* at 155.

12 *Id.*; *cf. Physicians Desk Reference* 1558 (1990) (oral contraceptives should not be taken when pregnant); A. Guttmacher, *Pregnancy, Birth & Family Planning* 482 (1986) (insertion of IUD when one is confident of non-pregnancy).

13 *See* Torres, *supra* note 2, at 137 (Table 4) (99% of all family planning clinics nationwide provide pregnancy tests and 92% provide pregnancy counseling).

14 For example, all pregnant women will continue to receive prenatal counseling regarding "the health of . . . [the] unborn child," § 59.8(a)(2), including "information regarding good health practices during pregnancy," Pr., 53 Fed. Reg. 2937. In addition, the Title X provider may discuss the option of adoption and may refer women for treatment of conditions, other than pregnancy, diagnosed at the clinic. Pr., 53 Fed. Reg. 2927, 2937.

Section 59.8(a)(1) of the new regulations provides that a "Title X project may not provide counseling concerning the use of abortion . . . or provide referral for abortion." Rather, under the new regulations, "once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." § 59.8(a)(2).[15] If a pregnant client asks for information about abortion or its availability,[16] the Title X physician or counselor is to reply that "the project does not consider abortion an appropriate method of family planning." § 59.8(b)(5). Thus, as between two mutually exclusive choices legally available to a pregnant woman, counseling and referral is forbidden about one and compelled about the other.

The new regulations further require that the mandatory referral list for prenatal care itself be skewed against the option of abortion. The list must include any available prenatal care providers "who do not perform abortions," but may not include providers "whose principal business is the provision of abortions." § 59.8(a)(3), (b)(3), (b)(4). It is undisputed that the latter requirement would effectively eliminate from the referral list most abortion providers accessible to low-income women. 82a. Indeed, 70% of abortions nationally and 73.5% of those in New York are performed at clinics that might be considered to "principally" provide abortions. *Id.* Only hospitals, which are geographically or economically inaccessible, and private practitioners, who gen-

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15 The only exception to the mandatory referral for prenatal care arises when "emergency care is required," at which time "the Title X project shall . . . refer the client immediately to an appropriate provider of emergency medical services." § 59.8(a)(2). The exception applies only where continued pregnancy would be life-threatening, *e.g.*, Pr., 53 Fed. Reg. 2937, and does not, in any event, permit a physician to call attention to the relationship between a patient's pregnancy and her medical condition. Pr., 53 Fed. Reg. 2937; J.A. 174-75.

16 At some Title X programs as many as 72% of patients diagnosed as pregnant request referrals for abortion services. J.A. 284. Nationally, 46.8% of all unintended pregnancies end with an abortion. Forrest & Singh, *Public-Sector Savings Resulting from Expenditures For Contraceptive Services*, 22 Fam. Plan. Persp. 6, 9 (1990) (Table 2).

erally do not accept Medicaid or provide reduced-cost care, could be included on the list. J.A. 156, 181-82. Moreover, the Title X physician is prohibited from identifying those providers on the list, if any, that perform abortions. *See* § 59.8(a)(3).

The undisputed evidence below, *see* 10a; 41a, shows that the regulations will cause substantial harm to the women served by the Title X program. Most women will be subjected to dangerous delays in obtaining an abortion[17] and some women may be driven to acts of desperation or into continuing unwanted pregnancies.[18] Further, the regulations prevent Title X physicians from advising women with serious medical conditions, such as hypertension, diabetes, and sickle cell anemia,[19] which are not emergencies under the regulations, *see* J.A. 254-55, that continuation of pregnancy may aggravate long-term risks and jeopardize health. For example, a woman with a severe congenital heart disease who becomes pregnant cannot be told that she may face up to a fifty percent chance of death as a result of the tachycardia, increased

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17 Delay increases the mortality risk for abortion 50% each week after the eighth week of pregnancy and the risk of major complications 30% each week. J.A. 227, 192-95. *See* Henshaw, *Induced Abortion: A World Review, 1990*, 22 Fam. Plan. Persp. 76, 81 (1990).

18 For example, if a thirteen-year-old incest victim who lives in Cayuga County, one of the counties in New York without any abortion providers, becomes pregnant, she will have to call provider after provider on the list until she happens to stumble upon one that tells her she can have an abortion and where. Some young women may be deterred entirely while others may turn to unlicensed providers or attempt self-abortion. *E.g.*, J.A. 252, 254. Still others, particularly teenagers, may run away from home to conceal pregnancies or may become suicidal. J.A. 219-20; *see* J.A. 286.

19 Hypertension, for example, complicates about eight to ten percent of pregnancies. *Clinical Obstetrics* 645 (C. Pauerstein ed. 1987); *see* Rosenfield ¶¶ 10-11 at 681-83A. Similarly, a pregnant woman with diabetes is more likely to develop infections of a greater severity, injure her birth canal during vaginal delivery, require a caesarian section, and hemorrhage after delivery. J. Pritchard, P. MacDonald & N. Gant, *Williams Obstetrics* 600 (17th ed. 1985); *see* J.A. 254-55. Finally, pregnant women with sickle-cell anemia experience more frequent and severe health crises and are more susceptible to pneumonia, urinary tract infections, severe anemia, congestive heart failure, pre-eclampsia, and pulmonary complications such as embolus. *See generally* Rosenfield ¶ 14 at 684A.

cardiac output, and fluid retention that would accompany continued pregnancy. Rosenfield ¶ 10 at 681-82A. If such a woman cannot fully discuss the relationship between her heart condition and her pregnancy with her Title X physician, mere referral to a specialist, *see* Pr., 53 Fed. Reg. 2937, will be insufficient to safeguard adequately her health and to apprise her of the necessity of haste in obtaining treatment. As a consequence, some women may suffer direct physical harm, and nearly all women will lose the trust they have held for their Title X physicians. *See, e.g.*, J.A. 203, 220.

2. The physical and financial separation requirement

In addition, section 59.9 requires a Title X project to be "organized so that it is physically and financially separate" from "prohibited" activities. "Mere bookkeeping separation of Title X funds from other monies is not sufficient." § 59.9. The determination of the "objective integrity and independence" of the Title X project will turn on the "existence of separate accounting records," the physical segregation of "treatment, consultation, examination, and waiting rooms," the "existence of separate personnel," and the absence of "signs and material promoting abortion." § 59.9(a)-(d). The undisputed record below establishes that the organizational and physical restructuring necessary to satisfy these requirements would impose prohibitive costs, *e.g.*, J.A. 156, 165-66, 275; *see generally* 27a, and make it impossible to run multi-service reproductive health programs under a single roof.[20]

3. The abortion advocacy ban

Finally, section 59.10 prohibits activities that "encourage, promote or advocate abortion." The prohibition reaches all

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20 Many Title X clinics, for example, currently provide prenatal delivery and obstetric services with grants under the Maternal and Child Health Services ("MCH") Block Grant, Title V of the Social Security Act, 42 U.S.C. § 701 (1982). With Title V money, clinics provide essential prenatal and obstetric care, including genetic testing and amniocentesis, for low-income mothers. J.A. 173. Because counseling and discussion of abortion appropriately follow adverse test results, clinics will be unable to continue to provide these prenatal services on the same site as their Title X funded services. § 59.9; *see* Bennett ¶ 23 at 501-02A; J.A. 155, 166-67.

activities or information that "assist" a woman in obtaining an abortion or that make the abortion option more "accessib[le]." The ban thus extends to the provision of pamphlets, books, or sex education lectures that touch upon the subject of abortion as an option.

E. The Proceedings Below

Petitioners initiated this action on February 2, 1988 asserting both statutory and constitutional claims. Petitioners in the consolidated case in this Court, *New York v. Sullivan* (No. 89-1392), filed a similar action. On March 1, 1988 the district court granted a preliminary injunction, 427-28A, but on June 30, the court granted summary judgment in favor of the Secretary and dismissed the complaint, 9-32a.

On November 1, 1989, a divided court of appeals affirmed the district court decision. The opinion of the court deferred to the Secretary's unprecedented reinterpretation of the statute and concluded that the regulations did not impermissibly infringe on the fundamental rights of speech or privacy. 53-59a. Both the concurring and dissenting judges were troubled by the regulations which they found to interfere with a patient's informed choice about pregnancy and to create a risk of serious health consequences for women relying on Title X physicians. 61-62a (Cardamone, J., concurring); 65-66a (Kearse, J., dissenting). The dissent further concluded that the regulations discriminate on the basis of viewpoint in violation of the First Amendment, interfere with a woman's Fifth Amendment right to choose whether to have an abortion, and are "arbitrary and capricious." 63-67a. The Second Circuit decision, appealed herein, is alone in upholding the regulations. 41-60a. The First Circuit Court of Appeals and two district courts have struck them down.[21]

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21 *Massachusetts v. Secretary of Health & Human Servs.*, 899 F.2d 53 (1st Cir. 1990) (en banc), *aff'g*, 679 F. Supp. 137 (D. Mass. 1988), *cert. pending*, 58 U.S.L.W. 3834 (U.S. June 26, 1990); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (preliminary injunction), 687 F. Supp. 540 (D. Colo. 1988) (summary judgment), *appeal pending*, No. 88-2251 (10th Cir.) (oral argument held May 11, 1989); *see also West Virginia Ass'n of Community Health Centers, Inc. v. Sullivan*, No. 2:89-0330 (S.D.W. Va. Mar. 1, 1990). Due to the injunctions issued in these cases and by the courts below, 68-69a, the regulations have been blocked throughout much of the nation.

SUMMARY OF ARGUMENT

Through the challenged regulations, the Secretary seeks to transform a statute subsidizing a broad range of comprehensive family planning methods and services into an ideological device for distorting the vital medical information that Title X provides to low-income women. The restrictions the Secretary thus imposes on grantees exceed constitutional constraints on the conditions government may place on its benefits and grants, while defying the language, structure, and history of Title X.

No one has a right to a subsidy for the exercise of rights to speech and privacy, but when the government chooses to provide subsidies, there are some things it may not constitutionally do. First, as this Court has admonished in case after case, government cannot exact adherence to any orthodoxy through the imposition of viewpoint-based conditions on its largesse. Yet the regulations challenged here do just that, imposing upon health professionals and their patients a viewpoint-based regulatory scheme of precisely the sort this Court has previously left no doubt would violate the First Amendment. *See Arkansas Writers' Project, Inc. v Ragland*, 481 U.S. 221, 229-31 (1987); *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983).

The challenged regulations in fact prohibit all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term. Whatever the power of government to advance its views, this power is at its lowest ebb when it seeks to control the words spoken and the literature provided by the professional health care staff of the nonprofit private and public health agencies it has chosen to subsidize under Title X. Because they are viewpoint-based and intrude into an historically protected dialogue between doctor and patient,

the regulations violate the First Amendment rights of both speaker and listener in this medical context.

Second, government may not use the leverage of a subsidy to restrict speech underwritten by the recipient's own private funds. *See FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984). Yet these regulations violate this principle as well by restricting speech supported by such non-Title X sources as matching funds, patient fees, and other reimbursements or monies. Moreover, the regulations place severe burdens on expression of both parent organizations and affiliate clinics not funded by Title X: they flatly prohibit the physical consolidation of programs supported with financially segregated funds and cripple the ability of such affiliates to reach their intended audience.

Beyond their First Amendment flaws, the challenged regulations devastate the Fifth Amendment right to medical self-determination and privacy by depriving women, at a critical time of decision, of information potentially crucial to their health, while requiring the rote provision of a kind of government-approved referral that may be medically disastrous for them. Lured into Title X clinics by the apparent promise of reliable health care, indigent women leave the clinic not merely unenlightened but affirmatively misled. The lives and health of women are thus directly jeopardized—not, in this instance, because of poverty, but because of the mandatory misinformation the regulations require.

Finally, the Secretary must, but cannot, demonstrate that Congress explicitly authorized his novel construction of the Title X statute. The plain language, the legislative and administrative history, and the object and policy of Title X as a whole make clear that Congress intended to proscribe abortions, not speech, and to encourage integration of Title X programs into the general health care system. The regulations eviscerate the Title X program and the intent of Congress by subordinating its overarching interest in public health and equality of reproductive choice to the Secretary's ideological aims.

ARGUMENT

I. THE REGULATIONS VIOLATE THE FIRST AMENDMENT RIGHTS OF CLINICS, STAFF, AND PATIENTS THAT ARE SUBSIDIZED IN WHOLE OR IN PART BY TITLE X.

The regulations challenged here violate two well-established limitations on government's prerogative to implement policy choices through a subsidy scheme. First, they inject viewpoint-discriminatory controls on speech into a funded dialogue of particular sensitivity. *See infra* Point IA. Second, they condition receipt of Title X funds on the relinquishment of private freedom of expression. *See infra* Point IB. At stake in this case are the free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients under these two fundamental principles. Whatever the power of government to speak through its officials, or by earmarking federal funds, when it chooses to subsidize eligible "public or nonprofit private entities," 42 U.S.C. § 300(a) at J.A. 3, to perform a function such as health care, legal assistance, or education—the words of the doctor to her patient, of the lawyer to her client, and of the professor to her public university students, remain most assuredly the speech of private citizens. In accepting Title X funds, neither grantees nor the professionals they employ are transformed from private speakers into the "voice of America."[22]

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22 Little is more fundamental to our constitutional order than the proposition that private individuals are not transformed into government spokespersons because they are funded by the government. *See, e.g., Polk County v. Dodson*, 454 U.S. 312, 318 (1981); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 840-43 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1008-09 & n.19 (1982). Nor do states, cities, and their agencies become "field offices of the national bureaucracy," *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 777 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part), merely by accepting federal grants.

A. Sections 59.8 and 59.10 Impose Viewpoint-Discriminatory Conditions on Government Subsidies to Private Speakers in Violation of the First Amendment.

Sections 59.8(a)(1) and 59.10 completely proscribe the expression of one viewpoint while section 59.8(a)(2) requires the expression of another. If applied to nonfederally funded organizations, these restrictions would clearly violate the First Amendment's prohibitions on censoring speech[23] and on commanding it. *E.g.*, *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).[24] Moreover, the regulations would unquestionably violate the First Amendment's cardinal prohibition against prior restraints because they require "assurances" in advance that speakers conform their speech to this government-composed script. *See* § 59.7.[25] That these regulations purport to apply solely to the use of federal funds, *but see infra* Point IB, does not lessen their constitutional infirmity.

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23 *E.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)); *see also Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989) (noting that a "bedrock principle underlying the First Amendment . . . is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

24 *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., White, J., Rehnquist, J., dissenting) (stating that statutory provisions requiring physician to provide certain information to woman prior to performing an abortion may "violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology"). *See also Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 830 (1986) (O'Connor, J., Rehnquist, J., dissenting) (same).

25 This Court has long protected against the special dangers posed by such a requirement, *see New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931); *see also FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 604-07 (1990) (plurality opinion), even when the sole enforcement device used by government is the withholding of a government benefit, *see, e.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-72 (1988); *Speiser v. Randall*, 357 U.S. 513, 518-20, 528-29 (1958).

1. The regulations impermissibly discriminate on the basis of viewpoint and suppress truthful medical information.

The challenged regulations strike at the heart of what the First Amendment protects. They plainly "prescribe what shall be orthodox" in the dialogue between a Title X health professional and her patient, *see Texas v. Johnson*, 109 S. Ct. at 2546, while proscribing the discussion of "ideas" or information that the Secretary considers "dangerous," *see Cammarano v. United States*, 358 U.S. 498, 513 (1959). Face-to-face with a patient in need, a Title X health professional under these regulations will be compelled to communicate the Secretary's ideological slant against abortion and to selectively excise government-disapproved, but entirely truthful information about abortion from discussions with all pregnant patients and, indeed, from discussions with any patient who asks.

The regulations censor Title X physicians from "counseling concerning the use of abortion," § 59.8(a)(1); encouraging, promoting, or advocating abortion, § 59.10(a); and "assist-[ing] women to obtain abortions or increas[ing] the[ir] availability or accessibility," *id.* Since the provision of nondirective, factual information about abortion—even in response to a patient inquiry—is considered to "otherwise promote," *see* § 59.8(a)(4), or "increase . . . accessibility of abortion," *see* § 59.10(a), all speech about abortion that is either neutral or that casts abortion in a positive light is facially prohibited.[26] Thus, if a woman asks her doctor whether abortion is still legal, whether she will be able to obtain an abortion without parental involvement, or whether abortion is a safe and available option, her Title X health professional will be unable to answer the question. At the same time, the Title X doctor or counselor will be barred from referring the woman to an abortion provider or even to a provider that is likely to

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26 Thus, the prohibition of § 59.8(a)(1) applies to all "counseling *concerning* the use of abortion," (emphasis added), and is not limited to discussions in which a physician feels it necessary to advise her patient to consider abortion due to medical circumstances and thus to "counsel" abortion in a more affirmative sense.

give her the information she seeks, *see* § 59.8(a)(1), (a)(2), and will be unable to offer her materials such as the yellow pages or other informational pamphlets that may assist her, *see* § 59.10(a). But silence about abortion will not be the result. Instead, health professionals are to tell patients who ask that "the project does not consider abortion an appropriate method of family planning," § 59.8(b)(5), and to refer all pregnant women to prenatal care providers that "promote the welfare of . . . [the] unborn child," § 59.8(a)(2), while providing information necessary to protect the health of ". . . [the] unborn child," *id.* Thus, a negative message about abortion will be all that is conveyed.[27]

Although the government may use "carrots" to induce the speech and behavior of its citizenry, it may not use the power of the purse to ensure that private speakers espouse only a

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27 The viewpoint-discriminatory character of the regulations cannot be obscured by reading § 59.8(a)(1) as though it proscribed anti-abortion statements as well. For the regulations require the provision of "information, . . . to protect the . . . unborn child," § 59.8(a)(2), and elsewhere treat "counseling with respect to . . . abortion" as simply one among other means of "promot[ing] abortion . . . ." § 59.8(a)(4). Therefore, the regulations cannot be read as though they prohibited the expression of all opinions pro or con bearing on abortion; their proscription is decidedly one-sided.

In particular, it is untenable to say, as did the Second Circuit, that the regulations may not be deemed facially discriminatory unless their "actual effect" is to fund "[a]rgumentation . . . as to the advisability of an abortion" or to permit "public anti-abortion advocacy." 59a. When one viewpoint is entirely censored, *that* is viewpoint discrimination even if government does not, in the same breath, expressly promote the opposing viewpoint. Moreover, the "actual effect" of these regulations is plainly to eliminate all grantees from the Title X program who believe that abortion is one of several options that must be presented to pregnant women facing an unwanted or medically complicated pregnancy. The Title X "forum" for medical speech will thus be available only to those with one viewpoint. *United States v. Kokinda*, 58 U.S.L.W. 5013, 5016 (U.S. June 26, 1990). Finally, it cannot be disputed that the regulations were intended to advance a single government-approved viewpoint; they were promulgated to promote "right-to-life concerns" by modifying existing guidelines to permit "pro-life counseling centers" to participate in the Title X program. Letter from Representative Christopher H. Smith, *et al.*, to Donald T. Regan (Aug. , 1986) at 98-99a; *see also* Letter from Otis R. Bowen, M.D., to Representative Vin Weber (Aug. 19, 1986) at 99-100a.

government viewpoint. The "greater" power to fund no speech regarding a particular subject, or to earmark federal funds for a chosen purpose, most certainly does not include a "lesser" power to fund a class of nonfederal speakers on the condition that they speak only in favor of government-preferred views. Without this limitation, federal fora and subsidies involving speech—from the fund drive aimed at federal employees to the Medicaid, Medicare, or Veterans' disability programs—could be made available on terms consistent only with those views the federal government wishes to endorse. The law, of course, is otherwise.

This Court has repeatedly stated that government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' " *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) ("*TWR*") (quoting *Cammarano*, 358 U.S. at 513). Thus, a statute or regulation that merely subsidizes a particular activity presents a "very different question" from one "designed to discourage the expression of particular views." *Id.* at 551 (Blackmun, J., concurring). *See also Cammarano*, 358 U.S. at 513 ("[n]ondiscriminatory denial of [tax] deduction . . . is plainly not 'aimed at the suppression of dangerous ideas' ") (quoting *Speiser*, 357 U.S. at 519).

Consistent with *TWR*'s admonition, this Court held unconstitutional a governmental scheme designed to subsidize some magazines while not subsidizing others. *See Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 234 (1987). In so holding, the majority concluded that the scheme reflected a "disturbing use of selective taxation" because it conditioned a magazine's tax status on its content, a manner of discriminating in subsidies "particularly repugnant to First Amendment principles." *Id.* at 229. Even the dissenters in *Ragland* did not dispute that the Constitution constrains the manner in which the government disburses subsidies, noting that a "stringent" rule would be "appropriate . . . when the subsidy pertains to the expression of a particular viewpoint." *Id.* at 237 (Scalia, J., Rehnquist, J., dissenting). *See FCC v. League of Women Voters*, 468 U.S. 364, 383, 392 (1984); *see also id.* at 407 (Rehnquist, J., dissenting) (finding condition to be constitutional because "[i]n no sense can it be said that

Congress has prohibited only editorial views of one particular ideological bent").

This Court has applied these fundamental principles not only when the subsidy assumes the form of a grant or tax benefit, but also when it takes the shape of a forum to which speakers are granted access. *See Kokinda*, 58 U.S.L.W. at 5016 (reiterating that restrictions on access to or use of even nonpublic fora must be "viewpoint neutral"). Thus, when the government facilitates speech by providing or paying for a forum—be it a public, limited, or nonpublic forum—it may not distinguish between those granted and those denied access on the basis of viewpoint. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985); *see also Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

Because Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint. *See Massachusetts v. HHS*, 899 F.2d at 72-75. Together, sections 59.8 and 59.10 favor one side of a political controversy. *Cf. Boos v. Barry*, 485 U.S. 312, 319 (1988) (finding prohibition on pickets outside embassy involving speech critical of foreign government not to be viewpoint-based because it did *not* favor one side of a political controversy).[28] *See also Ragland*, 481 U.S. at 230; *Cornelius*, 473 U.S. at 806; *American Council of the Blind v. Boorstin*, 644 F. Supp. 811, 816 (D.D.C. 1986) (holding elimination of Playboy from magazines to be produced in braille an unconstitutional "viewpoint-based denial of a subsidy").

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28 The regulations at issue are akin to the restriction found unconstitutional in *Schacht v. United States*, 398 U.S. 58, 63 (1970), and characterized by this Court in *Boos* as viewpoint discriminatory. *Boos*, 485 U.S. at 319. In *Schacht*, the Court struck down a statute making it a crime for an actor to wear a military uniform in a play if the production discredited the military. Similarly, in this case, only nonpejorative speech about abortion is prohibited. As the Secretary himself concedes "§ 59.10, like the remainder of the rules [challenged herein], does exhibit a bias in favor of childbirth and against abortion." Pr., 53 Fed. Reg. 2943.

More than simply mandating the inclusion by a physician of medically relevant information, and more still than requiring the inclusion of government's anti-abortion viewpoint, these regulations selectively ban the communication of an entire array of factual information about abortion, even when that information is truthful, neutral, and medically appropriate. *Cf. Edwards v. Aguillard*, 482 U.S. 578, 634 (1987) (Scalia, J., dissenting) (characterizing constitutional prohibition on teaching facts supporting "creation science" as "repressive"). Government suppression of ideas is, of course, antithetical to the First Amendment. *See, e.g., FW/PBS, Inc.*, 110 S. Ct. at 605, 607 (plurality) (invalidating scheme that creates a "risk" of suppressing speech); *Lakewood*, 486 U.S. at 757 (same); *Mosley*, 408 U.S. at 92-98.

Animated by the intent to suppress access to an "idea" that the Secretary believes to be "dangerous," *TWR*, 461 U.S. at 548; *see Cornelius*, 473 U.S. at 806, the regulations strike at the heart of the First Amendment by attempting "to manipulate the choices of . . . citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice." *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 575 (1980) (Blackmun, J., concurring).[29] Since the regulations cannot be "justified without reference to the content [or viewpoint] of the regulated speech," *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), *quoted in Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989), or without reference to their intent to suppress the "idea" of abortion in the medical choices of low-income women, *see United States*

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29 As this Court stated in *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976):

> There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed and that the best means to that end is to open the channels of communication rather than close them . . . . But the choice among these alternative approaches is not ours to make or the [Secretary's] . . . . It is precisely this choice between the dangers of suppressing information, and the dangers of misuse if it is freely available that the First Amendment makes for us.

Id. at 770.

v. O'Brien, 371 U.S. 367, 377 (1968), they are plainly unconstitutional.[30]

2. Viewpoint-based manipulation of the Title X doctor-patient dialogue is particularly antithetical to the First Amendment.

Whatever the general powe of government to earmark funds or even to control the speech it subsidizes, surely it cannot manipulate the speech of a doctor or counselor with her patient.[31] The hallmark of the doctor-patient relationship is frank and uninhibited dialogue on subjects pertinent to medical conditions and medical choices. Our history and tradition demonstrate unswerving recognition of the sanctity of this dialogue.[32] A physician or counselor who has taken an

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30 One member of this Court recently noted that a restriction on speech in an arguably non-public forum must be

> . . . narrow in its purpose, design, and effect, . . . [must] not discriminate on the basis of content or viewpoint, . . . [and must be] narrowly drawn to serve an important governmental interest . . . .

Kokinda, 58 U.S.L.W. at 5018 (Kennedy, J., concurring in judgment). No such interest has been proffered by the Secretary.

31 As Justice Douglas stated, "The right of the doctor to advise his patients according to his best lights seems so obviously within [the] First Amendment . . . as to need no extended discussion." *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting) (dissenting from a ruling on standing).

32 The notion that a physician must be able freely to advise, counsel, and discuss treatment options with a patient can be traced as far back as Plato. In *The Laws*, Plato stated:

> [T]he slave doctor[ ] . . . prescribes what he thinks good, out of the abundance of his experience, as if he had no manner of doubt; and when he has given his orders, like a tyrant, he rushes off . . . . But the other doctor, who is a freeman, attends and practices upon freemen . . . . [H]e enters into discourse with the patient and with his friends, and is at once getting information from the sick man, and also instructing him as far as he is able, and he will not prescribe for him until he has first convinced him . . . . Now, which is the better way of proceeding in a physician and in a trainer?

Plato, *The Laws* 293 (B. Jowett trans. 2d ed. 1875). Tracing the roots of the notion of medical self-determination, this Court recently noted state courts'

oath to an outside authority that precludes candid discussion tailored to the individual circumstances of the patient cannot discharge these well established professional and ethical duties.[33] Regulations that excise all nonpejorative references to abortion from that dialogue do not leave intact the role of the physician as so conceived. Instead, they transform the physician, otherwise free to exercise her professional discretion on a case-by-case basis, into a government bureaucrat without any discretion at all.[34]

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long-standing recognition of the "informed consent" doctrine—a concept that presupposes a free exchange between doctor and patient. *See Cruzan v. Director, Mo. Dep't of Health*, 58 U.S.L.W. 4916, 4917-18 (U.S. June 26, 1990). *See generally* Pernick, *The Patient's Role in Medical Decisionmaking: A Social History of Informed Consent in Medical Therapy*, in United States President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions* app. E (1983). As in the lawyer-client relationship, the confidential nature of the doctor-patient dialogue has also been long protected. *See Trammel v. United States*, 445 U.S. 40, 51 (1980) (discussing doctor-patient and lawyer-client testimonial privileges and noting they are "rooted in the imperative need for confidence and trust").

33 The professional standards of the American Medical Association ("AMA"), J.A. 79-81, and the American College of Obstetricians & Gynecologists ("ACOG"), J.A. 76-78, require doctors to provide full, unbiased information about and referral for all medical alternatives, *see generally* 80-82a; 78-80a, even for those treatment options they are unwilling or unable to provide, *see* 84a; Cohen ¶ 3 at 509-10A. Where not medically contraindicated, the physician's duty to communicate honestly and accurately with a patient dates back to the first AMA Code of Medical Ethics. *See* J. Bell, Introduction to *Proceedings of the National Medical Conventions, held in New York, May, 1846, and in Philadelphia, May, 1847* 88 (1847) (regarding creation of the first Code of Medical Ethics) ("Veracity . . . is a jewel of inestimable value in medical description and narrative . . . which ought never to be tainted for a moment, by even the breath of suspicion.").

34 Indeed, the regulations impose a particularly severe chill on the exercise of medical discretion because the fuzziness of the lines they draw will induce self-censorship of the worst kind. *See Baggett v. Bullitt*, 377 U.S. 360, 372 (1964). For example, § 59.8(a)(4) allows for "the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception . . . *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning." (emphasis in original). How is a physician to know in advance whether giving a woman

A woman who comes to a doctor working in an institution that receives Title X funds, like all patients, believes that her doctor will give her full information about her legally available and medically appropriate options. She is neither told, nor can she typically afford, to seek a second opinion. In this context it is wholly unrealistic to treat the regulations as mandating one-sided speech that will be countered by speech on the other side in the private marketplace. Indeed, as this Court recognized in *Virginia Citizens Consumer Council*, those whom the suppression of health information "hits the hardest are the poor . . . [who] are [among] the least able to learn, by shopping from . . . [clinic to clinic], where their scarce dollars are best spent" or which doctor they should trust. 425 U.S. at 763. For the five million women seen annually in Title X clinics, the Secretary's chosen means of enforcing orthodoxy is indistinguishable from that which would result from an across-the-board criminal or regulatory ban on abortion counseling and referral. Government imposed distortion of the Title X doctor-patient dialogue severely infringes the woman's right to receive unbiased medical information. *See Lamont v. Postmaster General of the United States*, 381 U.S. 301, 307 (1965); *see also Virginia Citizens Consumer Council*, 425 U.S. at 756-57.[35]

The Title X health professional stands in the position of fiduciary to her patients.[36] Lacking equality in information and knowledge, the patient trusts and relies on the physi-

information about abortion, to be weighed in conjunction with contraceptive choice, will subsequently be considered by the Secretary to have promoted or encouraged abortion? A chill on medical speech resulting from such ambiguities is inevitable.

35 Even if Title X patients could obtain full and fair information elsewhere, this Court has never recognized a "general principle that freedom of speech may be abridged when the speaker's listener could [, theoretically,] come by his message by some other means." *Virginia Citizens Consumer Council*, 425 U.S. at 757 n.15, *quoted in Ragland*, 481 U.S. at 231; *see also TWR*, 461 U.S. at 553.

36 A fiduciary relationship "exists when there is a reposing of faith, confidence and trust, and the placing of reliance by one upon the judgment of the another." *Black's Law Dictionary* 564 (5th ed. 1979).

cian's judgment and information.[37] J.A. 207, 219; 88a. Quite often there is no other source of critical health care information, *e.g.*, J.A. 144-45, 244-45; *see Griswold v. Connecticut*, 381 U.S. 475, 503 (1965) (White, J., concurring), and the patient's reliance on the Title X program borders on "captivity." *See generally Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (characterizing as captive those present as a matter of necessity rather than choice). While the government "clearly has a right to express [its] views to those who wish to listen, [it] has no right to force [a particular] message upon an audience incapable of declining to receive it." *Id.* at 307 (Douglas, J., concurring).

The regulations are "[c]raft[ed] . . . in [a] fashion [that] constitutes a trap for the mostly unsophisticated and unwary patients" at a Title X clinic. 61a (Cardamone, J., concurring). "Captive," and trusting in a fiduciary who unbeknownst to her is not free to act as an advisor in her best interests, the Title X patient is susceptible to being misled and unable to filter out the distortion that the government imposes on her doctor's advice. Because it is conveyed in confidence by a fiduciary, the misinformation she receives will be imbued with exaggerated though unwarranted reliability.[38] Sections 59.8 and 59.10 thus serve as a devastatingly effective means of suppressing the idea of abortion, as well as information about its safe and lawful availability, in the minds of low-income women served by the Title X program. The government is not simply adding information to the "marketplace of ideas." Rather, because the Title X program is often the only "marketplace" in which low-income women

37 This reliance and inequality of knowledge underlie the legal imperatives governing the doctor-patient dialogue. Doctors in New York, as in a majority of states, *see* Exhibit B, risk liability for failure to provide patients with complete information as to their medical options. *E.g.*, J.A. 174, 241; *see also* N.Y. Pub. Health Law § 2805-d (McKinney Supp. 1989).

38 Recognition of the potential for undue influence in such a context has, for example, prompted this Court to uphold restrictions on in-person solicitation of clients by attorneys, while striking restrictions on comparable solicitation in other contexts. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-42 (1985); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457-58 (1978).

can obtain medical counsel and information, sections 59.8 and 59.10 impermissibly skew a source of information that government has itself monopolized.[39]

B. The Regulations Violate the First Amendment by Penalizing Speech Funded with Non-Title X Monies.

This Court has "long[ ]rejected [the] fallacy that a privilege may be burdened by unconstitutional conditions." *Rutan v. Republican Party*, 58 U.S.L.W. 4872, 4879 (U.S. June 19, 1990) (Stevens, J., concurring); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (government "may not deny a benefit . . . on a basis that infringes . . . constitutionally protected interests—especially, [the] interest in freedom of speech"). In *FCC v. League of Women Voters*, 468 U.S. 364 (1984), this Court held that speech-restrictive conditions on a public benefit that infringed upon a recipient's ability to engage in the prohibited speech activity "using even wholly private funds" constituted just such an unconstitutional condition.[40] *Id.* at 399-401. The challenged regulations violate this principle in several independent, but equally damaging ways.[41]

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39 Commentators have long noted the need to distinguish between government expression that simply adds to and that which approaches monopolization of the marketplace of ideas. *E.g.*, T. Emerson, *The System of Freedom of Expression* 698 (1970) (characterizing the state of affairs when "the functions or powers of government may give it a monopoly or near monopoly over expression" as "the antithesis of a system of free expression"); *see also Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 & n.8 (1989); *Student Gov't Ass'n v. Board of Trustees*, 868 F.2d 473, 479 n.4 (1st Cir. 1989).

40 The state cannot, consistent with the Constitution, condition tax exemptions, *Speiser*, 357 U.S. at 518-19, unemployment benefits, *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514, 1516-18 (1989), or even public employment, *Rankin v. McPherson*, 483 U.S. 378, 390-92 (1987), on the relinquishment of First Amendment freedoms. *See also Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1408 (1990) (Scalia, J., dissenting) ("It is rudimentary that the State cannot exact as the price of . . . special advantages the forfeiture of First Amendment rights.").

41 It would be inappropriate for this Court to sever any regulatory provisions found to be invalid from those found to be permissible unless it is clear that to do so would be consistent with the Secretary's intent and would

1. Sections 59.8 and 59.10 restrict speech funded by non-Title X sources.

On their face, the challenged regulations expressly require Title X recipients to spend non-Title X funds to provide incomplete and biased medical information. This is so because sections 59.8 and 59.10 restrict speech throughout the "Title X program" or "project" defined to include all plans, activities, and resources under a single administrative umbrella funded in any part by Title X. § 59.2.[42] The regulations specifically subject "grant funds, grant-related income or matching funds" to the restrictions on speech in sections 59.8 and 59.10. *Id.* The Secretary does not dispute that the challenged regulations govern these non-Title X monies, Brief for the Respondent at 6 n.6, *Rust v. Sullivan* and *New York v. Sullivan* (Nos. 89-1391, 1392) ("*Respondent's Brief on Certiorari*"), nor does the Secretary dispute that grant-related income includes all "patient charges or reimbursement from collateral sources."[43] *Id.* However, section 59.2 defines "Title

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leave the permissible provisions "fully operative" standing alone. *Alaska Airlines v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)); *see also Thornburgh*, 476 U.S. at 764-65. Sections 59.8, 59.9, and 59.10 all apply to the Title X project or program as defined in § 59.2; § 59.7 requires assurances of compliance with §§ 59.8 through 59.10, and § 59.9 requires separation from that which is prohibited in §§ 59.8 and 59.10. The regulations were designed collectively to set "standards for compliance" with § 1008, Pr., 53 Fed. Reg. 2922, as evidenced not only by statements of their singular purpose, *id.* at 2925, but also by the omission of a severability clause. *See Massachusetts v. HHS*, 899 F.2d at 76. The regulations are thus too intertwined to permit the Court to invalidate any single provision without rewriting the whole—a power it lacks. *See, e.g., Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986).

42 "Program" and "project" are defined "interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework." § 59.2. "Title X program" or "project" is defined as "the identified program which is approved by the Secretary for support." *Id.*

43 Patients whose income is between 100% and 250% of the federal poverty line are required to pay a fee for services along a scale of scheduled discounts; patients with income above 250% are charged a fee "designed to recover the reasonable cost of providing services." §§ 59.5(a)(7), 59.2. The

X project funds" to "includ[e] but not [be] limited to" these sources of non-Title X funds. Thus "*all* funds allocated to the Title X program" are swept within the scope of the restrictions set forth in sections 59.8 and 59.10. § 59.2 (emphasis added).[44]

Although the Secretary claims that section 59.10 applies only to the use of Title X project funds, *see Respondent's Brief on Certiorari* at 6, the section is not so limited. A Title X program cannot even make available to its patients textbooks describing the abortion procedure, pamphlets discussing the availability of abortion at wholly distinct entities, or the yellow pages—though written, produced, and placed within the Title X program entirely without the expenditure of even a single Title X dollar. These materials must be purged from the waiting rooms, treatment rooms, and resource centers of Title X facilities because they will "increase the availability or accessibility of [the] abortion" option. § 59.10; *see also* 61a (Cardamone, J., concurring) (finding regulations bar "use" of yellow pages "as a reference source for Title X patients"); 64-65a (Kearse, J., dissenting) (same).

On its face, section 59.9 affords no option for continuing prohibited speech about abortion with non-Title X monies swept within the definition of "Title X project funds." Instead, section 59.9 permits grantees to engage in prohibited speech when separate from the "Title X project." Section 59.9 makes no provision for continued speech about abortion with non-Title X grant dollars that are defined to be *within* the Title X project. Because the regulations thus condition the Title X grant on the unavoidable relinquishment of speech about abortion funded by those non-Title X sources

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income derived from such visit fees alone constitutes as much as 23% of the revenues of some plaintiffs' family planning programs. FY 1989 Grant Thornton Audit Report MHRA (June 30, 1989) (submitted to HHS, Region II) (percent of revenue attributable to patient fees of the family planning program of PPNYC in the South Bronx).

44 Many clinics allocate substantial non-Title X resources to their Title X family planning programs in order to expand the number of patients reached and served. *See supra* note 5.

that are within the Title X project, they violate the First Amendment. *See FCC*, 468 U.S. at 399-401.[45]

2. Section 59.9 subjects Title X recipients to impermissible burdens on speech funded by non-Title X sources.

In addition, section 59.9 severely impairs and may render physically impossible the effort of Title X grantees to engage in protected speech by consolidating programs supported with financially segregated funds. Most Title X recipients also receive funds from a multitude of other governmental and private sources. *E.g.*, J.A. 161, 234. Section 59.9 will cast asunder the delicate financial balance of the nonprofit and public entities participating in the Title X program.[46] This is so because programs funded by non-Title X sources that necessarily include the speech prohibited by sections 59.8 and 59.10 must be run in physically separate locations to comply with section 59.9.[47]

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45 Statutes conditioning the award of state funds on cessation of abortion counseling, even with private funds, have consistently been held to condition benefits impermissibly on the relinquishment of constitutional rights. *Planned Parenthood v. Arizona*, 718 F.2d 938, 944-46 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986); *Valley Family Planning v. North Dakota*, 489 F. Supp. 238, 242-43 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99 (8th Cir. 1981); *see Planned Parenthood Ass'n v. Kempiners*, 531 F. Supp. 320, 324-25 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983); *see also Massachusetts v. HHS*, 899 F.2d at 73-74.

46 As of April 1, 1981, 63% of Title X grantees were nonprofit, nongovernmental agencies. General Accounting Office, *Restrictions On Abortion And Lobbying Activities In Family Planning Programs Need Clarification* (Sept. 24, 1982) ("*GAO Report*") at J.A. 94. Title X grants are not even available to "for profit" private health care providers. 42 U.S.C. § 300(a) at J.A. 3.

47 Services and speech funded by non-Title X sources frequently include options counseling. For example, a woman having amniocentesis, funded by Title V, Maternal and Child Health Services Block Grant, Title V of the Social Security Act, 42 U.S.C. § 701 (1982), ordinarily will be provided with information on *all* pregnancy options in the event of an adverse test result. J.A. 204; *see* J.A. 166-67. Similarly, a woman at high risk of

The inability of grantees to consolidate programs supported by financially segregated funds in order to facilitate the provision of health services and information to low-income women "dilutes" effective expression, *see Buckley*, 424 U.S. at 65-66, and violates the First Amendment, *see Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294-99 (1981).[48] "To say that . . . collective action in pooling . . . resources to amplify . . . voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means . . . ." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985); *see also, e.g., United Transp. Union v. State Bar*, 401 U.S. 576, 580 (1971) (right to unite to speak "effectively and economically"); *NAACP v. Button*, 371 U.S. 415 (1963). This Court has never hinted that a prohibition on pooling financially segregated funds can be made a condition of a government subsidy.[49]

Title X clinics are both free-standing and hospital-based.[50] In either setting, Title X patients and those seeking services outside the scope of the Title X program generally walk in

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AIDS seen at a family planning program subsidized by the New York State Department of Health who is planning to become or who is already pregnant must be advised "of the implications of seropositivity for both mother and child" and "made aware of all options." *See* Ex. F to Complaint, *Rust v. Bowen* (No. 88-702) (HIV Guidelines for Subsidized Family Planning Clinics); *see also* J.A. 175.

48 For example, clinics that comply with § 59.9 will be constrained in their ability to implement an innovative and respected health care philosophy favoring the integration of family planning, prenatal, adoption, and abortion services into a single coordinated program. This philosophy, for which several Title X recipients are well-known, *see, e.g.*, J.A. 278, Bennett ¶ 24 at 502A, has proven to be especially effective for teenagers, who frequently do not pursue referrals. J.A. 219-21, 279-80.

49 This Court has neither upheld nor sanctioned a requirement of separation going beyond financial segregation of accounts. *See, e.g., TWR*, 461 U.S. at 544 & n.6; *FCC*, 468 U.S. at 400.

50 For example, in New York, 4 of the 41 Title X delegates are hospitals, 4 are health departments, and 33 others are private agencies. Gesche (Ex. A) (Listing New York State Delegate Agencies) at 555-56A; J.A. 160-61 (listing MHRA delegates).

the same doorway, see the same receptionist, and may share the same waiting room. Overhead, administrative, and personnel costs unrelated to programmatic activities are generally shared, even where funds are financially segregated. The undisputed record below makes clear that at least 50% of Title X clinics lack the resources to duplicate and sustain waiting rooms, treatment rooms, equipment, and staff—ranging from their executive director to their doctors and counselors—entirely distinct from those of the Title X program.[51] *See* 27a; *see also Massachusetts v. HHS*, 899 F.2d at 59-60.[52] Moreover, it would be grossly inefficient and wasteful to do so.[53]

Those clinics that find physical separation impossible to finance will have to cease all speech about abortion in order to continue to receive Title X funds. These grant recipients are akin to the broadcasting station in *FCC* and to the plaintiff in *Frazee*—forced to choose between a government benefit and a fundamental right. Even for those grantees that are able to comply with section 59.9, the burdens imposed are onerous and thus comparable to those found unconstitutional

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51 Eight of 16 affiants below stated that they could not afford to comply with the separation requirement. J.A. 156, 165-67, 275; Bennett ¶¶ 23-25 at 501-03A; Pasternack ¶ 14 at 674-75A; Potteiger ¶ 21 (Dec. 15, 1987); Klepper ¶ 30 (Feb. 5, 1988); Stein ¶ 11 (Feb. 7, 1988). These clinics, along with the entire not-for-profit sector, have long and justifiably relied on the permissibility of pooling resources to meet costs unrelated to the substance of the funded programs. Although § 59.9 indicates that the Secretary will consider factors such as the degree of separation of the Title X project from "treatment, consultation, examination, and waiting rooms[ ] in which prohibited activities [and speech] occur" and "the existence of separate personnel," nowhere does the section specifically include as a "fact[ ] or circumstance[ ]" to be considered the burden imposed on the grant recipient. § 59.9.

52 The ability of Title X grant recipients to satisfy the conditions of § 59.9 will also be limited by their inability to use non-Title X monies, treated by § 59.2 as "Title X project funds," to allay the costs of separation. *See generally supra* Point IB(1).

53 Although these duplicative costs will continue indefinitely, HHS offers clinics the possibility of using grant funds for the "one-time costs associated with relocating a Title X clinic . . . ." Pr., 53 Fed. Reg. 2941. A one-time grant enhancement does not alleviate the costs of ongoing duplication.

in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252, 255 (1986) (plurality opinion); *see also Austin*, 110 S. Ct. at 1423 (Kennedy, J., dissenting). These burdens are gratuitous and wholly unrelated to the government's only legitimate interest—to ensure that *its* dollars are not expended on the speech prohibited with the government grant.[54]

3. Sections 59.8 and 59.9, in tandem, impermissibly obstruct effective expression funded by non-Title X sources.

The regulations impermissibly burden the speech of those organizations that can afford to create and sustain the separate affiliate required by section 59.9 by impeding the ability of the non-Title X affiliate and of the parent organization to communicate views and information to their target audience. Once the Title X project is separated from a non-Title X affiliate, staff at the Title X clinic will not be able to advise a woman of the availability of services at its own affiliate, but must instead refer her to other programs in the community.[55] Women will thus enter—and leave—the Title X clinic either unaware of the affiliate or uninformed about the distinctions between the services and information available at the Title X

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54 There is no showing that physical separation is necessary to prevent government funding of speech about abortion. *See generally Massachusetts v. Bowen*, 679 F. Supp. 137, 142 (D. Mass. 1988) (summarizing evidence showing no need for physical separation), *aff'd, Massachusetts v. HHS*, 899 F.2d at 74-75 & n.13 (finding physical separation requirement not necessary to ensure that government funds were not spent for purpose outside scope of program); *see also* 66a (Kearse, J., dissenting) (citing to *GAO Report*); *cf. Planned Parenthood v. Arizona*, 789 F.2d at 1351 (finding no showing that monitoring of state funds was impossible and thus holding unconstitutional statutory prohibition against funding organizations providing abortions).

55 Section 59.8(a)(3) prohibits inclusion on the mandatory referral list of non-Title X affiliates that provide abortions. *See supra* Statement of the Case. Moreover, even if the non-Title X affiliate can be included on the referral list, any effort by a Title X subsidized health care provider to refer a patient specifically to the affiliate would violate § 59.8(a)(3)'s prohibition against "'steering' clients to providers who offer abortion as a method of family planning" and its prohibition against referrals that may be considered a "means of encouraging or promoting abortion." *Id.*

clinic and its non-Title X affiliate a few blocks or even floors away.

In so doing, the regulations will deflect and deplete the audience of the non-Title X affiliate because the Title X program will attract women in the vicinity to its services and redirect them from the non-Title X services.[56] In this way, the speech of both private affiliate and parent organization is abridged. "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." *Lamont*, 381 U.S. at 308 (Brennan, J., concurring). First Amendment rights of one individual, like the non-Title X affiliate here, may be infringed by direct restrictions imposed on its listeners, *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974), or upon those with whom it wishes to associate, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), *quoted in Healy v. James*, 408 U.S. 169, 183 (1972). The fact that a speaker can speak to someone who has not been thus limited is no answer, for communication is generally directed at a particular audience. *Healy*, 408 U.S. at 176, 181-83 (infringement on right to reach particular audience not ameliorated by ability to reach different audience). The Title X affiliate, as well as the parent organization, thus faces "insurmountable" barriers to the exchange of information with the very audience they most need to reach. *See TWR*, 461 U.S. at 553 (Blackmun, J., concurring); *see also Austin*, 110 S. Ct. at 1409 n.* (Scalia, J., dissenting).

II. THE REGULATIONS VIOLATE THE FIFTH AMENDMENT BY OBSTRUCTING A WOMAN'S DECISION-MAKING ABOUT HER PREGNANCY AND BY INJURING HER HEALTH.

Prompt, accurate information is essential to all medical choices. Mandatory distortion of relevant medical informa-

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56 In addition, a woman denied information about her options at the Title X affiliate may be deterred by the unresponsiveness of the health care providers from ever seeking the services of its non-Title X program. *E.g.*, J.A. 280. Moreover, should she subsequently learn of the affiliate, the Title X patient may be unable to seek its services, for she may no longer have the financial resources to pay for the affiliate services, having expended them at the Title X program. *Massachusetts v. HHS*, 899 F.2d at 70.

tion and a prohibition against individualized referral destroy a patient's capacity to obtain timely medical care and, in many instances, impose real physical harm for which a physician may be liable.[57]

This Court has repeatedly and recently underscored the importance of medical self-determination to an individual's constitutional guarantee of liberty. *Cruzan v. Director, Mo. Dep't of Health*, 58 U.S.L.W. 4916, 4920 (U.S. June 26, 1990); *Washington v. Harper*, 110 S. Ct. 1028, 1036 (1990). In so holding, this Court has recognized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person . . . ." *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891), *quoted in Cruzan*, 58 U.S.L.W. at 4917. Integral to this right is the ability to make an informed and voluntary choice as to the proper course of treatment. *See Cruzan*, 58 U.S.L.W. at 4917-20 (and cases cited therein).[58] This interest in self-determination is at the

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57 Under the law of a number of states, health care providers may be liable for injury resulting from failure to refer a patient or for the consequences of an inadequate or inappropriate referral. 70 C.J.S. *Physicians and Surgeons* §§ 69, 74 (1987). For example, a physician may be held liable for failure to refer a patient to a specialist when " 'the physician knows, or should know, that he does not possess the requisite skill, knowledge or facilities to properly treat a patient's ailment.' " *See Dewes v. Indian Health Serv.*, 504 F. Supp. 203, 208 (D.S.D. 1980) (citation omitted). A physician who makes a medically inappropriate referral "can be held negligent for referring a patient he knows to be in need of a particular type of care to a physician who cannot provide it." *Rise v. United States*, 630 F.2d 1068, 1072 (5th Cir. 1980). Delay in making the referral may also constitute malpractice. *Erickson v. Waller*, 116 Ariz. 476, 479, 569 P.2d 1374, 1377 (Ct. App. 1977). The referring physician who has not treated the patient may still be subject to "a duty to disclose . . . all material information which would enable [the patient] to make an informed decision whether to see the specialist or not." *Moore v. Preventative Medicine Medical Group*, 178 Cal. App. 3d 728, 738, 223 Cal. Rptr. 859, 863 (Ct. App. 1986).

58 As this Court acknowledged in *Cruzan*, the doctrine of informed consent is rooted in our legal history and tradition. 58 U.S.L.W. at 4918 (principle of informed consent "has become firmly entrenched in American tort law"); *id.* at 4922 (O'Connor, J., concurring) (emphasizing that self-determination is "inextricably entwined" with "our notions of liberty"). Indeed, 30 states and the District of Columbia have held that physicians

heart of the right of reproductive choice. *See Roe v. Wade*, 410 U.S. 113, 153 (1973). As this Court has previously recognized, reproductive "decisions are . . . more basic to individual dignity and autonomy" than nearly any other. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).[59] In reproductive medical decisions, as in all others, the ability to rely on the physician's advice, exercised according to the patient's best interests, is a critical component of medical liberty.[60]

Whether viewed as "fundamental" or as an aspect of "liberty" protected by the Fifth and Fourteenth Amendments, this right to self-determination and to make informed medical decisions free of government-imposed harm is hardly left "unfettered" by these regulations. *See Harris v. McRae*, 448 U.S. 297, 328 (1980) (White, J., concurring). Instead, the regulations positively distort the decisionmaking that follows

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may be liable for failure to disclose alternative treatment or other information material to a patient's ability to make informed medical decisions. Exhibit B.

59 The challenged regulations impose upon Title X health professionals an even tighter "straitjacket" than that struck down in *Thornburgh* and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). In those cases, this Court rejected government efforts "to wedge [its] . . . message discouraging abortion into the privacy of the informed-consent dialogue." *Thornburgh*, 476 U.S. at 762; *see also Akron*, 462 U.S. at 443-44. Nothing in the statutes at issue in these cases prohibited the physician from specifically providing information about the availability of abortion or advising the woman of the limitations of the information required by the State. In this case, however, the health provider's speech is not only compelled, but also censored.

60 As early as 1973, in *Doe v. Bolton*, this Court noted that the interests of the woman seeking medical advice about a pregnancy are best served by "allow[ing] the attending physician the room he needs to make his best medical judgment." 410 U.S. 179, 192 (1973); *see, e.g., Colautti v. Franklin*, 439 U.S. 379, 396-97 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976). Last term this Court reaffirmed this principle. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3055 (1989) (viability testing requirement applies only if tests would be "useful" and consistent with "professional skill and judgment"); *id.* at 3061-62 (O'Connor, J., concurring in judgment) (testing requirement constitutional, in part because it applies only where "useful" and "when not imprudent").

the diagnosis of pregnancy and directly impose real and, at times, severe medical risks on women making reproductive choices.

A woman diagnosed at a Title X program as pregnant must be referred only for prenatal care. As a consequence, pregnant women are not left in the same position as if the government had funded no Title X program at all. Some Title X patients, particularly those who are unaware of the option of legal, safe abortion,[61] will be led to believe that childbirth is their only alternative, J.A. 154, 284-85, or that abortion is neither appropriate nor medically indicated in their case, J.A. 285-86, J.A. 228-29. For example, a woman who becomes pregnant with an IUD in place needs timely medical advice that removal of the IUD is imperative and that an abortion should be promptly considered because delay could cause sepsis and death.[62] *See also supra* text at 8-9. Generally, women will be delayed by government-mandated inappropriate referrals and will face an increase in the risk of mortality and morbidity associated with abortion.[63] J.A. 227-29. An automatic referral for prenatal care is, thus, an affirmative, deliberate obstruction that both eliminates this vital information and directly imperils women's health.[64]

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61 One study exploring why women delayed in obtaining abortions indicated that five percent of the women did not know they could get an abortion. Torres & Forrest, *Why Do Women Have Abortions?*, 20 Fam. Plan. Persp. 169, 174 (1988).

62 S. Romney, M.J. Gray, A. Little, J. Merrill, E. Quilligan & R. Stander, *Gynecology and Obstetrics: The Health Care of Women* 834 (1981); J. Pritchard, P. MacDonald & N. Gant, *Williams Obstetrics* 822-23 (17th ed. 1985); *see also* J.A. 263-64; *see generally* Rosenfield ¶¶ 8-18 at 680-86A (discussing medical indications).

63 *E.g.*, Cates, *Adolescent Abortions in the United States*, 1 J. of Adolescent Health Care 18, 20 (1980) (delay is greatest cause of increase in risk). Despite the increase in risk associated with delay in abortion, at no time in pregnancy is abortion more risky than childbirth. *See* Tietze & Henshaw, *Induced Abortions: A World Review 1986* 4, 110-11 (Alan Guttmacher Institute 1986).

64 Some of these women, but for the presence of the Title X clinic in their community, would have sought and received diagnosis and complete

Although the government need not "enter or remain in the business of performing abortions," *see Webster*, 109 S. Ct. at 3052, it may not dispense subsidies it has chosen to provide in a manner that "places obstacles in the path of a woman's exercise of her freedom of choice," *McRae*, 448 U.S. at 316; *see Maher v. Roe*, 432 U.S. 464, 470, 473-74 (1977), and it may not "attempt to persuade by inflicting harm on the listener [for this] is an unacceptable means of conveying a message" favoring childbirth, "that is otherwise legitimate." *Carey v. Population Servs. Int'l*, 431 U.S. 678, 715 (1977) (Stevens, J., concurring).[65]

The Second Circuit concluded that because the regulations are a condition on a subsidy, they do not constitute an "affirmative legal obstacle," despite the fact that they "hamper or impede women in exercising their right of privacy." 55a. If this were so, then no condition on a government subsidy could violate the Fifth Amendment even if the condition imposed real harm on patients who depend on government subsidies for medical care.[66] Thus, although the government has an interest in conserving medical resources, a requirement that doctors not even *tell* older kidney patients subsidized by Medicare about the availability of a limited supply of life-

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information about their treatment alternatives elsewhere. Fee-paying patients who obtain a pregnancy test in a Title X clinic may expend their available funds on misleading information when they might have obtained full information elsewhere. *See Massachusetts v. HHS*, 899 F.2d 53, 70 (1st Cir. 1990) (en banc).

65 In *Maher*, *McRae*, and *Webster*, upon which the court of appeals relied, 53-56a, this Court emphasized that "[t]he Government does not seek to interfere with . . . the choice of any woman to have an abortion. The woman's choice remains unfettered . . . ." *McRae*, 448 U.S. at 328 (White, J., concurring). *See also Webster*, 109 S. Ct. at 3052 (refusal to make public hospitals available for abortions left indigent woman with same range of choice as if there had there been no public hospitals); *Maher*, 432 U.S. at 473-74 (1977) (refusal to subsidize did not interfere with decision whether to terminate pregnancy); *see also Akron*, 462 U.S. at 444 n.33.

66 In 1986, over 90% of physicians reported treating patients whose principal source of coverage was Medicare. American Medical Association Center for Health Policy Research, *Socioeconomic Characteristics of Medical Practice, 1987* 11 (1987).

extending kidney dialysis machines would directly impose harm on the patient and would thereby raise constitutional liberty concerns. The patient's death or reduced life span stems, in such an instance, from government-imposed misinformation—not from poverty.[67]

Because these regulations manipulate the doctor-patient dialogue so as to require the provision of misinformation, "the Secretary's policy does not merely fail to remove obstacles to abortions—it creates obstacles." *Massachusetts v. HHS*, 899 F.2d at 69, 70.[68] The regulations distort the decisionmaking process of every woman diagnosed as pregnant at a Title X clinic—those who could have gone elsewhere as well as those who have nowhere else to go. Indiscriminately, they subject all women to health risks that are a direct consequence of the mandated provision of misinformation. Under any standard of review, these regulations impermissibly interfere with the Fifth Amendment rights of women seeking medical care at Title X clinics.

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67 In upholding the constitutionality of the regulations, the Second Circuit reasoned that if the government can constitutionally prohibit abortion services in all public facilities, *see, e.g., Webster*, 109 S. Ct. at 3052, it can prohibit public funds from being used to speak about abortion, as the former "seems . . . a prohibition substantially greater in impact . . . ." 55a. However, the "greater" power to deny reimbursement for or access to abortions does not include the power to distort information integral to a decision whether to seek those services. To the contrary, this "lesser power" has the greater and unique effect of interfering with a woman's decisionmaking process even after she leaves the Title X subsidized clinic.

68 *West Virginia Ass'n of Community Health Centers, Inc. v. Sullivan*, No. 2:89-0330, slip op. at 40-42 (S.D.W. Va. Mar. 1, 1990). *See also Reproductive Health Servs. v. Webster*, 851 F.2d 1071, 1080 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989); *Planned Parenthood Ass'n v. Kempiners*, 531 F. Supp. 320, 329 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983).

III. INASMUCH AS THE CHALLENGED REGULATIONS RAISE SERIOUS CONSTITUTIONAL CONCERNS, THEY MUST BE REJECTED BY THIS COURT BECAUSE THEY ARE NEITHER REQUIRED NOR EXPRESSLY AUTHORIZED BY THE LANGUAGE, STRUCTURE, OR HISTORY OF TITLE X.

An agency construction of a statute that raises grave constitutional concerns must be rejected unless clearly authorized by Congress. At a minimum, the language, structure, and history of Title X do not reveal the requisite clear intent to support the Secretary's construction; indeed, petitioners submit that the agency's new construction is contrary to the statute's language and intent. The Secretary's effort to stretch statutory terms beyond their ordinary meaning so as to authorize encroachment on protected speech is, therefore, impermissible.

A. Where an Agency's Construction of a Statute Raises Serious Constitutional Concerns, It Must Be Expressly Required or Endorsed by Congress.

Where scrutiny of the language, structure, and history of a statute fails to reveal a precise congressional intention contrary to the challenged agency action, this Court would ordinarily defer to a reasonable agency construction within the scope of agency expertise, *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 844 (1984), so long as that construction is consistent with the statute, *Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 2854, 2863 (1989); *see Etsi Pipeline Project v. Missouri*, 484 U.S. 495, 516-17 (1988), and not arbitrary or capricious, *Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1860-61 (1989). In *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, however, this Court restated a recognized exception to this general rule:

> Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

485 U.S. 568, 575 (1988); *see also NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01 (1979); *Kent v. Dulles*, 357 U.S. 116, 127-30 (1958). Nor is it necessary for this Court to decide conclusively whether the challenged regulations are constitutional because even "substantial . . . constitutional doubts . . . warrant the employment of [this] canon of statutory construction." *United States v. Security Indus. Bank*, 459 U.S. 70, 74 (1982); *see Catholic Bishop*, 440 U.S. at 501 (Court makes "narrow inquiry whether the [agency action] presents a significant risk" of unconstitutionality); *Kent*, 357 U.S. at 129-30. *See generally Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring in judgment) (avoidance of constitutional questions is a "venerable principle").

It cannot be disputed that the Secretary's construction of section 1008 raises serious constitutional questions.[69] This Court must, therefore, "independently inquire" whether an alternative interpretation exists that can fairly be ascribed to the statute and that would avoid serious constitutional concerns. *DeBartolo*, 485 U.S. at 577; *Kent*, 357 U.S. at 127-30; *see also Gomez v. United States*, 109 S. Ct. 2237, 2241 (1989). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895), *quoted in DeBartolo*, 485 U.S. at 575; *e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *United States v. Clark*, 445 U.S. 23, 28-29, 31 (1980). Only the "clearest indication" that Congress intended what the challenged regulations prescribe would permit deference by this Court to an agency interpretation necessitating the resolution of serious constitutional issues. *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 63 (1964); *see Catholic Bishop*, 440 U.S. at 500 (requiring " 'affirmative intention of

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69 *See Massachusetts v. HHS*, 899 F.2d 53, 64-75 (1st Cir. 1990) (en banc) (regulations violate constitutional rights of privacy and free speech); 63-66a (Kearse, J., dissenting) (same); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1473-78 (D. Colo. 1988) (same). *See also West Virginia Ass'n of Community Health Centers*, slip op. at 40-44, 56-57 (same as to portions of regulations).

the Congress *clearly expressed*' ") (emphasis added) (citation omitted).[70]

B. Section 59.8's Ban on Abortion Information, Counseling, and Referral Conflicts with the Language, History, and Purpose of Title X and Is Neither Required nor Expressly Authorized by Section 1008 of the Act.

This Court's review of an agency's construction of a statute begins with an evaluation of whether Congress has spoken to the precise question at issue. *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43; *see also Fort Stewart Schools v. FLRA*, 110 S. Ct. 2043, 2046 (1990). The "starting point" in expounding a statute is its language, *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 308 (1989) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980)), which must be read in a manner consistent with ordinary usage, *Dole v. United Steelworkers*, 110 S. Ct. 929, 934 (1990); *Fort Stewart Schools*, 110 S. Ct. at 2046, and in light of the structure, object, and policy of the statute as a whole, *see Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989); *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817, 1821-22 (1988).

If the plain language of the statute is inconclusive, when faced with a "pure question of statutory construction," this Court must "determine congressional intent, using [its] traditional tools." *United Steelworkers*, 110 S. Ct. at 934; *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987).[71] These

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70 Without such an exacting standard, "decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." *Greene v. McElroy*, 360 U.S. 474, 507 (1959).

71 The "narrow legal question" of the appropriate construction of Title X is "quite different from the question of interpretation that arises in . . . case[s] in which the agency is required to apply . . . standards to a particular set of facts." *See Cardoza-Fonseca*, 480 U.S. at 446, 448. *See also* Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 Admin. L.J. 255, 263-64 (1988) (distinguishing

tools of construction include review not only of the statutory language, but of its legislative history and administrative construction as well. *See NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123-25 (1987); *see also Davis v. United States*, 110 S. Ct. 2014, 2019-22 (1990). Because the judiciary is "the final authority" on pure questions of statutory construction,[72] *see Chevron*, 467 U.S. at 843 n.9; *Cardoza-Fonseca*, 480 U.S. at 447-48, deference to the agency is inappropriate except insofar as long-standing agency construction is probative of congressional intent. *See United Food & Commercial Workers*, 484 U.S. at 123, 124 n.20 (relying on agency construction to ascertain intent of Congress); *Davis*, 110 S. Ct. at 2022 (same).[73]

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between courts' responsibility to define statutes and agencies' responsibility to apply statutes).

72 When reviewing an agency interpretation of law, courts must not "slip into . . . judicial inertia" or "rubber-stamp" agency decisions. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983). *See also* Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 394 (1986) ("Courts are fully capable of rigorous review of agency determinations of law, for it is the law that they are expert in, and it is in interpreting law that their legitimacy is greatest."); Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 407, 446 (1989).

73 Courts should defer to an agency action only within the scope of authority delegated by Congress. *Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1390-91 (1990); *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2571 n.12 (1989). Title X, unlike some statutes, does not delegate the authority to promulgate substantive regulations akin to "law." *E.g.*, *Batterton v. Francis*, 432 U.S. 416, 425 & n.9 (1977); *cf. Sullivan v. Zebley*, 110 S. Ct. 885, 888 & n.2, 890 (1990) (invalidating regulations promulgated under broad rule-making authority). Title X authorizes the Secretary to administer a federal grant program, not to regulate the family planning "industry."

Moreover, the challenged regulations do not stem from agency expertise regulating a complex industry according to technical and evolving standards. *See Chevron*, 467 U.S. at 865; *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1552 n.9 (1990). The construction of § 1008 is not uniquely within agency expertise but is instead a question of law for the courts to decide. *See Marsh*, 109 S. Ct. at 1860-61; *Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984). *See generally* Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 469 (1987); Breyer, *supra* note 72, at 368, 370; Byse, *supra* note 71, at 258.

1. The plain language of section 1008

The challenged regulations purport to interpret a narrow exception in the Title X statute: "None of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 at J.A. 10. A clinic that provides counseling services to pregnant patients about a range of options, including abortion, is not in ordinary parlance one that uses abortion "as a method of family planning." As commonly understood, this phrase denotes the use of abortion as a substitute or equivalent to a method of contraception.[74]

The common meaning of the word "method" is "a procedure or process for attaining an object." *See Webster's Third New International Dictionary* 1422 (1965).[75] "Family planning" ordinarily means "planning intended to determine the number and spacing of one's children by effective methods of birth control," *Webster's Third New International Dictionary* 62a (1971 Addenda), a term itself defined as a means of "preventing or lessening the frequency of impregnation." *Webster's Third New International Dictionary* 221 (1965). A "method of family planning" is, thus, a particular contraceptive procedure or technology. Read in accord with common usage, therefore, section 1008 excludes abortion from the "broad range of . . . family planning *methods*" funded under section 300(a) of Title X. *See* 42 U.S.C. § 300(a)

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74 There is no evidence to support a charge that Title X providers have ever, or would ever, counsel pregnancy termination as a "family planning" option equivalent to diaphragms, IUDs, oral contraceptives, and other pregnancy prevention options. To the contrary, Title X programs, like all high quality providers of reproductive health services, treat abortion as a backup to contraceptive or human failure and as an option when pregnancy termination is medically indicated. *E.g.*, J.A. 254-55, 272. This understanding is consistent with both the ordinary meaning of the statutory phrase and with the agency's longstanding view. *See infra* Point IIIB(4).

75 In several recent cases, this Court has relied upon Webster's Dictionary to ascertain the plain meaning of a statute, *see, e.g.*, *Hughey v. United States*, 110 S. Ct. 1979, 1982 (1990); *Davis*, 110 S. Ct. at 2019; *Fort Stewart Schools*, 110 S. Ct. at 2046, and has invalidated statutory constructions that are inconsistent with such definitions. *See Hughey*, 110 S. Ct. at 1982-83; *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 420 (1988).

(emphasis added) at J.A. 3. Section 1008 makes no reference to "family planning . . . *services*," *id.*, which includes referrals, *see infra* Point IIIB(3).[76]

The phrase "abortion . . . [as] a method of family planning" in section 1008 qualifies the scope of programmatic activities to be provided pursuant to section 300(a), *see, e.g.*, *Department of Treasury, IRS v. FLRA*, 110 S. Ct. 1623, 1629 (1990), but the plain language of the section refers only to "abortion" and does not on its face exclude speech about abortion from the broad scope of medical and informational activities to be provided by Title X clinics. *See infra* Point IIIB(3). Indeed, when Congress has intended to ban counseling and referral for abortion, it has done so specifically. *See* Adolescent Family Life Demonstration Projects, 42 U.S.C. § 300z-10 (1982) (no funds for abortions or "abortion counseling or referral"); *see also* 42 U.S.C.A. § 300a-7(e) (West Supp. 1990) at J.A. 19 (no denial of training on basis of willingness or refusal to "counsel" abortions). Because Congress here chose a narrow exclusion to a statute of general application, "additional exceptions [ought] not to be implied." *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 617 (1980); *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983); *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 617 (1944).

2. The contemporaneous legislative history and administrative construction of section 1008

That section 1008's prohibition does not extend to speech is further supported by contemporaneous legislative and administrative history.[77] The Conference Report confirms

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76 In contrast with "method," the term "service" is defined broadly to encompass almost any activity that assists or benefits another. *See generally Webster's Third New International Dictionary* 2075 (1965).

77 The contemporaneous legislative history of a statute constitutes the most reliable indicator of congressional intent, and the Conference Report is the most persuasive of the available contemporaneous sources. *See National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 462 U.S.

that the plain language of section 1008 "prohibits the use of [Title X] funds for *abortion*." *See* H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8-9, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5081-82 ("*Conf. Rep.*") (emphasis added) at 70a. This Report also makes clear that section 1008 was intended as a narrow prohibition that would not interfere with Title X's expansive scope, *see infra* Point IIIB(3), or with programs providing abortions with separate funds and operated in accordance with state and local laws.[78] *See Conf. Rep.* at 5082; *see also infra* Point IIIC.

Contemporaneous agency constructions of section 1008 further confirm its narrow scope.[79] Indeed, an HHS General Counsel memorandum specifically concluded that "read literally[,] the phrase 'programs where abortion is a method of

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810, 832 n.28 (1983). This Court has frequently relied on contemporaneous indications of legislative intent as well as upon contemporaneous administrative interpretations to ascertain the meaning of statutory language. *See, e.g., Davis*, 110 S. Ct. at 2021-22; *Morash*, 109 S. Ct. at 1673-74; *United Food & Commercial Workers*, 484 U.S. at 123-30.

78 When Title X was enacted in 1970, Congress knew that the vast majority of states permitted abortions under varying circumstances. *See* 116 Cong. Rec. 24097-101 (1970); *Family Planning and Population Research, 1970: Hearings on S. 2108 and S. 3219 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 214 (1970) (testimony of Dr. Gerald Dorman, President, AMA); 116 Cong. Rec. 10279 (1970) (statement of Sen. Tydings). *See generally* B. Sarvis & H. Rodman, *The Abortion Controversy* 31-32 (1973); Roemer, *Abortion Law Reform and Repeal: Legislative and Judicial Developments*, 61 Am. J. Pub. Health 500 (1971).

79 In seeking to construe statutory language, this Court accords "great weight" to contemporaneous agency constructions of a statute, *Bank-America Corp. v. United States*, 462 U.S. 122, 130 (1983); *see also United Food & Commercial Workers*, 484 U.S. at 124 n.20; *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981), including those in the form of informal agency "interpretations and practices," *Davis*, 110 S. Ct. at 2022. This is because the agency is "presumed to have been aware of congressional intent" in enacting the law, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), may have been involved in drafting the legislation, *see Central Lincoln*, 467 U.S. at 390; *Rice v. Rehner*, 463 U.S. 713, 730 n.13 (1983), or may have had congressional "oversight and approval" when formulating the initial regulations, *see School Bd. v. Arline*, 480 U.S. 273, 279 (1987).

family planning,' most reasonably limits the prohibition contained in section 1008 to the financial support of programs in which abortions *are provided* as a method of family planning." Memorandum from Joel M. Mangel, Deputy Ass't Gen. Counsel, to Louis M. Hellman, M.D., Deputy Ass't Sec. for Pop. Affairs, at 2 (Apr. 20, 1971) ("*1971 Mangel Memo*") (emphasis in original) at J.A. 36.[80] Moreover, consistent with congressional recognition that abortion was widely available and legal in an ever-increasing array of circumstances and states, the agency recognized the proper place of abortion services "as a backup measure for contraceptive failure . . . ." National Center for Family Planning Servs., Health Servs. & Mental Health Admin., Department of Health, Educ., & Welfare, *A Five-Year Plan for the Delivery of Family Planning Services* 319 (Oct. 1971) ("*1971 Five-Year Plan*") at J.A. 42.

3. The structure, object, and policy of Title X as a whole

The structure and design of the statute as a whole reveal the intended breadth of the Title X program. *See Sullivan v. Everhart*, 110 S. Ct. 960, 964 (1990); *K Mart*, 486 U.S. at 291. The opening provision of the statute articulates its central goal: "[T]o assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services . . . ." 42 U.S.C. § 300(a) at J.A. 3. The "services" to be provided by Title X clinics were intentionally "broad," *see id.*, and "comprehensive," 42 U.S.C.A. § 300 historical note (West 1982) at 70a; 116 Cong. Rec. 37370 (1970) (statement of Rep. Bush) ("a broad range of maternal and child-health care services" include "complete yearly physical examinations" and "referrals"), because Congress

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80 The agency's 1971 regulations reiterated the view that the statute proscribed only "*abortions* as a method of family planning." Regulations Governing Grants for Family Planning Services, 36 Fed. Reg. 18466 (1971) (§ 59.5(a)(9)) (emphasis added) at J.A. 21; *see also* 42 C.F.R. § 59.5 (1986) (projects must "not *provide abortions* as a method of family planning") (emphasis added) at J.A. 26; 45 Fed. Reg. 37436-37 (1980) (same).

was aware that Title X would be the only source of medical care for some women.[81]

The express purposes of the Title X program include

> assist[ing] in making comprehensive voluntary family planning services readily available to all persons desiring such services; . . . enabl[ing] public and nonprofit private entities to plan and develop comprehensive programs of family planning services; [and] . . . develop[ing] and mak[ing] readily available information (including educational materials) on family planning and population growth to all persons desiring such information . . . .

42 U.S.C.A. § 300 historical note at 70-71a. As the Conference Report itself stated, in addition to "preventive family planning services," Title X was to fund "other related medical, informational, and educational activities." *Conf. Rep.* at 5081-82. Indeed, the Senate Report stressed that

> family planning [is not] merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices . . . . [A] successful family planning program must contain . . . [m]edical services, including consultation, examination, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed.

S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24095-96 (1970). This broad view of the Title X program is equally reflected in the agency's contemporaneous

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81 The Senate expressed the goal of providing reproductive health care to the "over five million American women [who] are denied access to modern, effective, medically safe family planning services due to financial need . . . ." 116 Cong. Rec. 24093 (1970) (statement of Sen. Hart) (quoting preamble of original Senate bill). *See also* H.R. Rep. No. 1472, 91st Cong., 2d Sess. 7, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5068, 5074.

construction of the statute and its purpose.[82] Thus, it appears that the statutory phrase "family planning . . . services" was specifically intended to include information and referrals, as needed and without exception, consonant with the broad object and policy of Title X as a whole.

4. Subsequent legislative and administrative history of Title X

Although this Court is ordinarily loathe to rely on subsequent legislative history as a tool of statutory construction, the subsequent history of Title X reveals a legislative endorsement of HHS's administration of the program that the Secretary seeks to bypass by regulatory fiat. Congress has repeatedly rejected amendments that would have restricted counseling, information, or referral for abortions in Title X facilities.[83] *See Bob Jones Univ. v. United States*, 461 U.S. 574, 600-01 (1983); *Pacific Gas & Elec. Co. v. State Energy*

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82 The agency's 1971 regulations required Title X funded programs to "[p]rovi[de] for medical services related to family planning including . . . necessary referral," 36 Fed. Reg. 18466 (§ 59.5(d)) at J.A. 21, and to "[p]rovi[de] for social services related to family planning, including counseling, referral . . . and such ancillary services as are necessary . . . ." *Id.* (§ 59.5(e)) at J.A. 21. In the first *Five-Year Plan*, the agency stated:

> In addition to specific contraceptive services, programs should make available other related medical examinations and tests to assist in the early detection of illness and disease. While the program cannot provide full medical care because of its specialized nature, services should be provided for the screening and referral, including followup, of the patient to appropriate physicians, hospitals or other programs for necessary treatment. This mechanism is vital, given the fact that family planning is often the point of entry into a fragmented health care system for many individuals.

1971 *Five-Year Plan* at J.A. 41.

83 For example, in 1974 and 1975 Congress explicitly considered and rejected three amendments prohibiting the use of federal funds for abortion referral services or promoting or encouraging abortion, *see* 120 Cong. Rec. 21687-95 (1974); 121 Cong. Rec. 20863-64 (1975); 30 Cong. Quart. Almanac 97 (1974). *See generally* Brief for Petitioners the State of New York, *et al.*, *New York v. Sullivan* (No. 89-1392) (full discussion of the subsequent legislative history of Title X); Brief of Representative Patricia Schroeder, *et al.* as *Amicus Curiae* in Support of Petitioners, *Rust v. Sullivan* and *New York v. Sullivan* (Nos. 89-1391, 1392) (same).

Resources Conservation & Dev. Comm'n, 461 U.S. 190, 220 (1983). Indeed, "[i]t is hardly conceivable that Congress . . . was not abundantly aware" at these times of the agency's longstanding interpretation of Title X.[84] *See Bob Jones*, 461 U.S. at 600-01. Where Congress decides not to overturn or alter a longstanding agency policy of which it is aware, this Court has been reluctant to endorse an alteration in the reading of a statute. *See Young v. Community Nutrition Inst.*, 476 U.S. 974, 983 (1986); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

In the instant case, the agency has long adhered to its contemporaneous construction of section 1008 and, on at least eight separate occasions, the agency explicitly stated its view that nondirective counseling and referral are permitted by Title X programs. *See generally* Exhibit C. The agency recognized that such counseling and referral does not steer women to have abortions, but rather permits them to make an informed and voluntary decision.[85] Further, referral of clients to abortion services when pregnancy termination was medically indicated was not considered to be a referral for abortion *as a method of family planning*. Memorandum from

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84 Throughout the history of Title X, Congress received and reviewed reports from the agency regarding the administration of the program. 42 U.S.C. §§ 300a-6a(a). In 1985, Congress' awareness of the agency's construction of § 1008 permitting nondirective counseling and referral for all pregnancy options including abortion was explicit. H.R. Rep. No. 403, 99th Cong., 1st Sess. 6 (1985) at 281A (stating that "[n]o agency shall be considered in violation of" Title X for providing "information and counseling" regarding "pregnancy termination"); *see also, e.g.*, H.R. Conf. Rep. No. 960, 99th Cong., 2d Sess. 12 (1986) at 777A (expressing concern that "the program not be changed through administrative action"); H.R. Rep. No. 159, 99th Cong., 1st Sess. 6-7 (1985) at 278-79A (disapproving of agency efforts "to create restrictions beyond the original intent of the law as unnecessary and without statutory foundation").

85 Letter from Louis M. Hellman, M.D., Deputy Ass't Sec. for Pop. Affairs, to Hilary H. Connor, M.D., Regional Health Admin'r (Nov. 19, 1976) ("A counselor working under the aegis of a physician . . . has not only a First Amendment right but [a] duty to inform a patient of all legal options.") at 74a; Memorandum from Carol Conrad, Senior Attorney, Pub. Health Div., Office of Family Planning (Apr. 14, 1978) at J.A. 56; Memorandum from Louis Balmonte, Regional Program Consultant, Office for Family Planning (May 25, 1979) at 75a.

Carol Conrad, Senior Attorney, Pub. Health Div., to Elsie Sullivan, Office for Family Planning (July 25, 1979) at J.A. 61-62.[86] Finally, in 1981 the agency adopted new Program Guidelines explicitly *requiring* that all pregnant patients receive nondirective counseling on *all* pregnancy alternatives, including abortion, and appropriate referral upon request. *1981 Program Guidelines* § 8.6 at 71a.

The Secretary's newfound construction of the meaning of section 1008 conflicts with the agency's long-held understanding of the statute. *See United Food & Commercial Workers*, 484 U.S. at 124 n.20; *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41-42 (1983); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 651 n.58 (1980). The agency's reinterpretation is, therefore, "entitled to considerably less deference," *Cardoza-Fonseca*, 480 U.S. at 446 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)), especially in light of the grave constitutional questions it needlessly engenders.

C. Section 59.9, Together with Section 59.2, Conflicts with the Language, Structure, and Purpose of Title X and Is Not Required or Expressly Authorized by Section 1008 of the Act.

The Secretary's definition of "project funds," § 59.2, and his unprecedented requirement of physical separation between permitted and prohibited activities, *see* § 59.9, burden the expressive use of non-Title X monies by grantees. Because these regulations independently raise serious constitutional concerns in this regard, *see supra* Point IB,[87] the agency must demonstrate that Congress clearly intended the adoption of regulatory provisions that would censor and restrict the communicative use of non-Title X income generated by grantees.

86 Similarly, information about abortion as a backup (as opposed to as a substitute) for contraception was not considered to present abortion as a method of family planning. *See, e.g.*, Memorandum from Joel M. Mangel, Deputy Ass't Gen. Counsel, to Louis M. Hellman, M.D., Deputy Ass't Sec. for Pop. Affairs at 4 (Jan. 18, 1973) at J.A. 47-48.

87 The Secretary does not refute that such a result raises "constitutional concerns." *See* Pr., 53 Fed. Reg. 2935, 2943.

DeBartolo, 485 U.S. at 575; *Catholic Bishop*, 440 U.S. at 500-01.

A review of the language of Title X shows that the statute not only fails to authorize the challenged regulations, but prohibits them. Contrary to the Secretary's novel expansion of his authority, *see* § 59.2; *see generally supra* Point IB(1), Congress authorized the Secretary to issue regulations that govern only "[g]rants and contracts made under this [Title X] subchapter." 42 U.S.C. § 300a-4(a) at J.A. 8. As to section 59.9, the plain language of Title X nowhere specifically suggests or requires that Title X clinics physically isolate themselves from general health care programs or from programs that provide abortions or abortion information with non-Title X funds. To the contrary, the statute by its terms requires establishment of a "State plan for a *coordinated* and comprehensive program of family planning services." 42 U.S.C. § 300a(a) (emphasis added) at J.A. 4.

The legislative history of Title X confirms that the abortion prohibition was "not intended to interfere with or limit programs . . . supported by funds other than those authorized under this legislation," *Conf. Rep.* at 5082, including programs that counsel or provide abortions.[88] Similarly, the agency's contemporaneous construction of the statute further explained that the word "program" in section 1008 did not include any and all family planning activities carried on by a Title X recipient, as this would undermine Congress' desire not to interfere with or limit other programs. *1971 Mangel Memo* at J.A. 38. HHS did not, therefore, require physical separation between activities prohibited and those permitted under Title X. *See id.* The Secretary makes no effort to reconcile this earlier conclusion, or the identical conclusion by

88 The Statement of Purpose in the House Report preceding the passage of Title X similarly stressed the importance of developing a comprehensive and coordinated program. *Conf. Rep.* at 5068. Subsequent legislative history further confirms that Congress sought to create a program coordinated and integrated with general health care services. S. Rep. No. 63, 94th Cong., 1st Sess. 65-66 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 528; *see also* H.R. Rep. No. 1524, 93rd Cong., 2d Sess. 58 (1974) (Title X services "most effectively provided in a general health setting"); 124 Cong. Rec. 31241-42 (1978).

the General Accounting Office,[89] with his current determination that "[h]aving a program that is separate from such [prohibited] activities is a necessary predicate to any determination that abortion is not being included as a method of family planning." Pr., 53 Fed. Reg. 2940.

Because the challenged regulations will place severe restrictions on programs supported by non-Title X funds that are operated by Title X grantee organizations, *see generally supra* Point IB, the requirement of physical separation not only will raise serious constitutional concerns but also will defeat the explicit legislative object and policy of expanding and integrating family planning services provided to low-income women. *See supra* Point IIIB(3). In fact, it is undisputed that many Title X clinics would be unable to afford a physically separate facility and would be forced to close. *Id.* As the First Circuit concluded, section 59.9 therefore exceeds the Secretary's authority under the statute, *Massachusetts v. HHS*, 899 F.2d at 60;[90] indeed, it promises to devastate the vast network of high quality clinical services that Title X has so successfully fostered.

CONCLUSION

Petitioners respectfully ask this Court to reverse the judgment of the Second Circuit Court of Appeals and to invalidate the challenged regulations codified at 42 C.F.R. §§ 59.2, 59.8, 59.9, 59.10.

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89 The GAO Report reiterated the agency's conclusion that "the activities (abortion and non-abortion) must be so separated as to constitute separate programs (projects). As we have already indicated, our conclusion does not require separate grantees or even a separate health facility." *GAO Report* at J.A. 109.

90 Moreover, the regulations are arbitrary and capricious, *see* 66a (Kearse, J., dissenting), and otherwise impermissible in that they reverse long-standing agency policy without "good reason for the change," *see Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1848 (1989); *see also* GAO Report at J.A. 84, and adopt a construction of the statute that will compel clinics that Congress sought to create to close their doors. *See supra* Point IB(2). Petitioners herein rely on co-petitioners, the State of New York, *et al.*, for further elaboration of this point. *See generally* Brief for Petitioners the State of New York, *et al.*, *New York v. Sullivan* (No. 89-1392).

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EXHIBIT A

Regulations Governing Grants for Family Planning Services, 42 C.F.R. §§ 59.1-59.10 (1988).

PART 59—GRANTS FOR FAMILY PLANNING SERVICES

* * * *

Subpart A—Project Grants for Family Planning Services

§ 59.1 To what programs do these regulations apply?

The regulations of this subpart are applicable to the award of grants under section 1001 of the Public Health Service Act (42 U.S.C. 300) to assist in the establishment and operation of voluntary family planning projects. These projects shall consist of the educational, comprehensive medical, and social services necessary to aid individuals to determine freely the number and spacing of their children.

§ 59.2 Definitions.

As used in this subpart:

"*Act*" means the Public Health Service Act, as amended.

"*Family*" means a social unit composed of one person, or two or more persons living together, as a household.

"*Family planning*" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. These means include a broad range of acceptable and effective methods and services to limit or enhance fertility, including contraceptive methods (including natural family planning and abstinence) and the management of infertility (including adoption). Family planning services includes preconceptional counseling, education, and general reproductive health care (including diagnosis and treatment of infections which threaten reproductive capability). Family planning does not include pregnancy care (including obstetric or prenatal

care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the incidence of abortion.

"*Grantee*" means the organization to which a grant is awarded under section 1001 of the Act.

"*Low-income family*" means a family whose total annual income does not exceed 100 percent of the most recent Community Services Administration Income Poverty Guidelines (45 CFR 1060.2). "*Low-income family*" also includes members of families whose annual family income exceeds this amount, but who, as determined by the Title X project director, are unable, for good reasons, to pay for family planning services. For example, unemancipated minors who wish to receive services on a confidential basis must be considered on the basis of their own resources.

"*Nonprofit*," as applied to any private agency, institution, or organization, means that no part of the entity's net earnings benefit, or may lawfully benefit, any private shareholder or individual.

"*Prenatal care*" means medical services provided to a pregnant woman to promote maternal and fetal health.

"*Program*" and "*project*" are used interchangeably and mean a coherent assembly of plans, activities and supporting resources contained within an administrative framework.

"*Secretary*" means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated.

"*State*" means one of the 50 States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, Northern Marianas, or the Trust Territory of the Pacific Islands.

"*Title X*" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"*Title X program*" and "*Title X project*" are used interchangeably and mean the identified program which is approved by the Secretary for support under section 1001 of the Act, as the context may require. Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§ 59.3 Who is eligible to apply for a family planning services grant?

Any public or nonprofit private entity in a State may apply for a grant under this subpart.

§ 59.4 How does one apply for a family planning services grant?

(a) Application for a grant under this subpart shall be made on an authorized form.

(b) An individual authorized to act for the applicant and to assume on behalf of the applicant the obligations imposed by the terms and conditions of the grant, including the regulations of this subpart, must sign the application.

(c) The application shall contain—

(1) A description, satisfactory to the Secretary, of the project and how it will meet the requirements of this subpart;

(2) A budget and justification of the amount of grant funds requested;

(3) A description of the standards and qualifications which will be required for all personnel and for all facilities to be used by the project; and

(4) Such other pertinent information as the Secretary may require.

§ 59.5 What requirements must be met by a family planning project?

(a) Each project supported under this part must:

(1) Provide a broad range of acceptable and effective medically approved family planning methods (including natural family planning methods) and services (including infertility services and services for adolescents). If an organization offers only a single method of family planning, such as natural family planning, it may participate as part of a Title X project as long as the entire Title X project offers a broad range of family planning services.

(2) Provide services without subjecting individuals to any coercion to accept services or to employ or not to employ any particular methods of family planning. Acceptance of services must be solely on a voluntary basis and may not be made a prerequisite to eligibility for, or receipt of, any other service, assistance from or participation in any other program of the applicant.

(3) Provide services in a manner which protects the dignity of the individual.

(4) Provide services without regard to religion, race, color, national origin, handicapping condition, age, sex, number of pregnancies, or marital status.

(5) Provide that priority in the provision of services will be given to persons from low-income families.

(6) Provide that no charge will be made for services provided to any person from a low-income family except to the extent that payment will be made by a third party (including a Government agency) which is authorized to or is under legal obligation to pay this charge.

(7) Provide that charges will be made for services to persons other than those from low-income families in accordance with a schedule of discounts based on ability to pay, except that charges to persons from families whose annual income exceeds 250 percent of the levels set forth in the most

recent CSA Income Poverty Guidelines (45 CFR 1060.2) will be made in accordance with a schedule of fees designed to recover the reasonable cost of providing services.

(8) If a third party (including a Government agency) is authorized or legally obligated to pay for services, all reasonable efforts must be made to obtain the third-party payment without application of any discounts. Where the cost of services is to be reimbursed under title XIX or title XX of the Social Security Act, a written agreement with the title XIX or title XX agency is required.

(9)(i) Provide that if an application relates to consolidation of service areas or health resources or would otherwise affect the operations of local or regional entities, the applicant must document that these entities have been given, to the maximum feasible extent, an opportunity to participate in the development of the application. Local and regional entities include existing or potential subgrantees which have previously provided or propose to provide family planning services to the area proposed to be served by the applicant.

(ii) Provide an opportunity for maximum participation by existing or potential subgrantees in the ongoing policy decisionmaking of the project.

(10) Provide for an Advisory Committee as required by § 59.6.

(b) In addition to the requirements of paragraph (a) of this section, each Title X project must meet each of the following requirements unless the Secretary determines that the Title X project has established good cause for its omission. Each Title X project must:

(1) Provide for medical services related to family planning (including physician's consultation, examination prescription, and continuing supervision, laboratory examination, contraceptive supplies) and necessary referral to other medical facilities when medically indicated, and provide for the effective usage of contraceptive devices and practices.

(2) Provide for social services related to family planning, including counseling, referral to and from other social and medical service agencies, and any ancillary services which may be necessary to facilitate clinic attendance.

(3) Provide for informational and educational programs designed to (i) achieve community understanding of the objectives of the Title X program, (ii) inform the community of the availability of services, and (iii) promote continued participation in the Title X project by persons to whom family planning services may be beneficial.

(4) Provide for orientation and in-service training for all Title X project personnel.

(5) Provide services without the imposition of any durational residency requirement or requirement that the patient be referred by a physician.

(6) Provide that family planning medical services will be performed under the direction of a physician with special training or experience in family planning.

(7) Provide that all services purchased for Title X project participants will be authorized by the Title X project director or his designee on the Title X project staff.

(8) Provide for coordination and use of referral arrangements with other providers of health care services, local health and welfare departments, hospitals, voluntary agencies, and health services projects supported by other Federal programs.

(9) Provide that if family planning services are provided by contract or other similar arrangements with actual providers of services, services will be provided in accordance with a plan which establishes rates and methods of payment for medical care. These payments must be made under agreements with a schedule of rates and payment procedures maintained by the grantee. The grantee must be prepared to substantiate that these rates are reasonable and necessary.

(10) Provide, to the maximum feasible extent, an opportunity for participation in the development, implementation, and evaluation of the Title X project by persons broadly representative of all significant elements of the population to be served, and by others in the community knowledgeable about the community's needs for family planning services.

* * * *

§ 59.7 Standards of compliance with prohibition on abortion.

A project may not receive funds under this subpart unless it provides assurance satisfactory to the Secretary that it does not include abortion as a method of family planning. Such assurance must include, as a minimum, representations (supported by such documentation as the Secretary may request) as to compliance with each of the requirements in § 59.8 through § 59.10. A project must comply with such requirements at all times during the period for which support under Title X is provided.

§ 59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall

be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

(b) *Examples.* (1) A pregnant client of a Title X project requests prenatal care services, which project personnel are qualified to provide. Because the provision of such services is outside the scope of family planning supported by Title X, the client must be referred to appropriate providers of prenatal care.

(2) A Title X project discovers an ectopic pregnancy in the course of conducting a physical examination of a client. Referral arrangements for emergency medical care are immediately provided. Such action is in compliance with the requirements of paragraph (a)(2) of this section.

(3) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The Title X project tells her that it does not refer for abortion but provides her a list which includes, among other health care providers, a local clinic which principally provides abortions.

Inclusion of the clinic on the list is inconsistent with paragraph (a)(3) of this section.

(4) A pregnant woman asks the Title X project to provide her with a list of abortion providers in the area. The project tells her that it does not refer for abortion and provides her a list which consists of hospitals and clinics and other providers which provide prenatal care and also provide abortions. None of the entries on the list are providers that principally provide abortions. Although there are several appropriate providers of prenatal care in the area which do not provide or refer for abortions, none of these providers are included on the list. Provision of the list is inconsistent with paragraph (a)(3) of this section.

(5) A pregnant woman requests information on abortion and asks the Title X project to refer her to an abortion provider. The project counselor tells her that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion. The counselor further tells the client that the project can help her to obtain prenatal care and necessary social services, and provides her with a list of such providers from which the client may choose. Such actions are consistent with paragraph (a) of this section.

(6) Title X project staff provide contraceptive counseling to a client in order to assist her in selecting a contraceptive method. In discussing oral contraceptives, the project counselor provides the client with information contained in the patient package insert accompanying a brand of oral contraceptives, referring to abortion only in the context of a discussion of the relative safety of various contraceptive methods and in no way promoting abortion as a method of family planning. The provision of this information does not constitute abortion counseling or referral.

§ 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with

the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

(a) The existence of separate accounting records;

(b) The degree of separation from facilities (*e.g.*, treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;

(c) The existence of separate personnel;

(d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

(1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning;

(2) Providing speakers to promote the use of abortion as a method of family planning;

(3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning;

(4) Using legal action to make abortion available in any way as a method of family planning; and

(5) Developing or disseminating in any way materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are

kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

* * * *

EXHIBIT B

Thus far, thirty states and the District of Columbia have held that physicians may be liable for failure to disclose alternative treatments or information material to the patient's ability to make informed medical decisions.

Alaska:	*Poulin v. Zartman*, 542 P.2d 251, 275 & n.57 (Alaska 1975).
Arkansas:	*Pegram v. Sisco*, 406 F. Supp. 776, 779-80 (W.D. Ark.), *aff'd*, 547 F.2d 1172 (8th Cir. 1976).
California:	*Moore v. Regents of Univ. of California*, No. S006987, slip op. at 10 (Cal. July 9, 1990); *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972) (en banc); *Nelson v. Gaunt*, 125 Cal. App. 3d 623, 634-35, 178 Cal. Rptr. 167, 172-73 (1981).
Colorado:	*Bloskas v. Murray*, 646 P.2d 907, 913 (Colo. 1982).
Connecticut:	*Logan v. Greenwich Hosp. Ass'n*, 191 Conn. 282, 290-93, 465 A.2d 294, 299-301 (1983).
District of Columbia:	*Hartke v. McKelway*, 707 F.2d 1544, 1548-49 (D.C. Cir.), *cert. denied*, 464 U.S. 983 (1983); *Crain v. Allison*, 443 A.2d 558, 562 (D.C. 1982).
Hawaii:	*Leyson v. Steuermann*, 5 Haw. App. 504, 512, 705 P.2d 37, 44 (1985).
Idaho:	*LePelley v. Grefenson*, 101 Idaho 422, 429, 614 P.2d 962, 969 (1980).
Illinois:	*Hansbrough v. Kosyak*, 141 Ill. App. 3d 538, 551, 490 N.E.2d 181, 190 (1986).

Indiana: *Martin v. Rinck*, 501 N.E.2d 1086, 1087 (Ind. Ct. App. 1986); *Weinstock v. Ott*, 444 N.E.2d 1227, 1236 (Ind. Ct. App. 1983).

Iowa: *Pauscher v. Iowa Methodist Medical Center*, 408 N.W.2d 355, 359-60 (Iowa 1987).

Louisiana: *Hondroulis v. Schumacher*, 546 So.2d 466, 469-70 (La. 1989); *Harwell v. Pittman*, 428 So.2d 1049, 1054 (La. Ct. App. 1983).

Maine: *Jacobs v. Painter*, 530 A.2d 231, 235 (Me. 1987).

Maryland: *Sard v. Hardy*, 281 Md. 432, 440, 379 A.2d 1014, 1020 (1977).

Massachusetts: *Kissinger v. Lofgren*, 836 F.2d 678, 680-81 (1st Cir. 1988); *Harnish v. Children's Hosp. Medical Center*, 387 Mass. 152, 155, 439 N.E.2d 240, 243 (1982).

Minnesota: *Kinikin v. Heupel*, 305 N.W.2d 589, 594-95 (Minn. 1981); *Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 & n.2 (Minn. 1980) (en banc).

Nebraska: *Muller v. Thaut*, 230 Neb. 244, 250-51, 430 N.W.2d 884, 889 (1988).

New Jersey: *Largey v. Rothman*, 110 N.J. 204, 208, 213, 540 A.2d 504, 506, 509 (1988).

New Mexico: *Keithley v. St. Joseph's Hosp.*, 102 N.M. 565, 569, 698 P.2d 435, 439 (Ct. App. 1984).

New York: *Nisenholtz v. Mount Sinai Hosp.*, 126 Misc. 2d 658, 660-61, 483 N.Y.S.2d 568, 570 (Sup. Ct. 1984), *aff'd*, 115 A.D.2d 1022, 496 N.Y.S.2d 886 (App. Div. 1985); *Crisher v. Spak*, 122 Misc. 2d 355, 359, 471 N.Y.S.2d 741, 744 (Sup. Ct. 1983).

North Dakota: *Winkjer v. Herr*, 277 N.W.2d 579, 587 (1979).

Oklahoma: *Spencer By and Through Spencer v. Seikel*, 742 P.2d 1126, 1129 (Okla. 1987); *Smith v. Reisig*, 686 P.2d 285, 288-89 (Okla. 1984).

Oregon: *Getchell v. Mansfield*, 260 Or. 174, 183, 489 P.2d 953, 957 (1971).

Pennsylvania: *Moure v. Raeuchele*, 387 Pa. Super. 127, 132, 563 A.2d 1217, 1220 (Super. Ct. 1989).

South Dakota: *Wheeldon v. Madison*, 374 N.W.2d 367, 371, 375 (S.D. 1985); *Cunningham v. Yankton Clinic*, 262 N.W.2d 508, 511 (S.D. 1978).

Utah: *Nixdorf v. Hicken*, 612 P.2d 348, 354 (Utah 1980).

Vermont: *Small v. Gifford Memorial Hosp.*, 133 Vt. 552, 557, 349 A.2d 703, 706 (1975).

Virginia: *Bly v. Rhoads*, 216 Va. 645, 648, 222 S.E.2d 783, 785-86 (1976).

Washington: *Keoghan v. Holy Family Hosp.*, 95 Wash. 2d 306, 315, 318, 622 P.2d 1246, 1252, 1254 (1980) (en banc).

West Virginia: *Cross v. Trapp*, 294 S.E.2d 446, 455 (W. Va. 1982).

Wisconsin: *Scaria v. St. Paul Fire & Marine Ins. Co.*, 68 Wis. 2d 1, 11, 227 N.W.2d 647, 653 (1975).

EXHIBIT C

Chronology of Administrative Interpretations of Title X Permitting Nondirective Abortion Counseling and Referral

Oct. 1971

National Center for Family Planning Services, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, *A Five-Year Plan for the Delivery of Family Planning Services*

"[A]bortions are . . . viewed as . . . a service that should be available in accordance with local laws only in the event of a human or contraceptive method failure . . . . Abortion would then serve as a backup measure for contraceptive failure, thereby still further assuring the freedom of choice of those who do not desire an unwanted birth." J.A. 42.

Jan. 18, 1973

Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs

"[W]e continue to believe that [Dingell's statement] does not legally require the extension of [section 1008] to the collection and dissemination of information." J.A. 46.

Jan. 1976

United States Department of Health, Education, and Welfare, *Program Guidelines For Project Grants For Family Planning Services*

If a patient becomes pregnant with an IUD in place, "[t]he patient and her physician should discuss whether it is best to terminate or to continue the pregnancy." J.A. 51.

Title X project should "give pregnancy counseling, when appropriate . . . [and] [m]ake appropriate referrals for any needed services not furnished through the facility." J.A. 52.

Nov. 19, 1976

Letter from Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, to Hilary H. Connor, M.D., Regional Health Administrator

"[I]f you are funded under Title X, you cannot promote or encourage abortion. In other words, you should not employ directive counseling in relation to abortions. A counselor working under the aegis of a physician, however, has not only a First Amendment right but [a] duty to inform a patient of all legal options. The right to make referrals comes under the First and Fourteenth Amendments as well as the Code of Ethics of the American Medical Association." 74a.

Apr. 14, 1978

Memorandum from Office of the General Counsel, Department of Health, Education, and Welfare

Consistent with section 1008, Title X projects may "[s]upply information to those who do not want to continue their pregnancies, and may be interested in obtaining abortions" and "[r]efer clients to doctors to obtain abortions." J.A. 54, 55.

"[T]he provision of information concerning abortion services, mere referral of an individual to another provider of services for an abortion, and the collection of statistical data and information regarding abortion are not considered to be proscribed by § 1008." J.A. 56.

May 25, 1979

Memorandum from Louis Belmonte, Regional Program Consultant, Family Planning

"The provision of information on abortion services and the mere referral of a patient to another provider for such a procedure are permissible." 75a.

July 25, 1979

Memorandum From Department of Health, Education, and Welfare [Carol Conrad, Senior Attorney, to Elsie Sullivan]

"[A] project *may*, consistent with § 1008, make 'mere referrals' for abortion, as long as it does not then go on to promote or encourage use of the procedure for family planning purposes." (emphasis in original) J.A. 62.

Where "a referral [for abortion] is necessary because of medical indications, abortion is not being considered as a method of family planning at all, but rather as a medical treatment . . . . As such, it would not come within the scope of § 1008 at all, since that section reaches only cases which relate to the use of abortion 'as a method of family planning.' " J.A. 63.

"[W]e do not believe that requiring referrals where abortion appears medically indicated falls afoul of this limitation either." J.A. 64.

Oct. 9, 1980

***Amicus* Brief of the Secretary of Health and Human Services, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981)**

"It is thus clear that referral services are a *required* part of the Title X program. The question, then, is whether this broad regulatory requirement for referral services includes a requirement for *abortion* referral services. We submit that it clearly does." (emphasis in original) 97A.

"[T]his agency has consistently interpreted sec. 1008 as not prohibiting 'mere referrals' for abortion." 98A.

1981

United States Department of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services*

Women "requesting information on options for the management of an unintended pregnancy are to be given non-directive counseling on the following alternative courses of action, and referral upon request:

— Prenatal care and delivery

— Infant care, foster care, or adoption

— Pregnancy termination"

71a.